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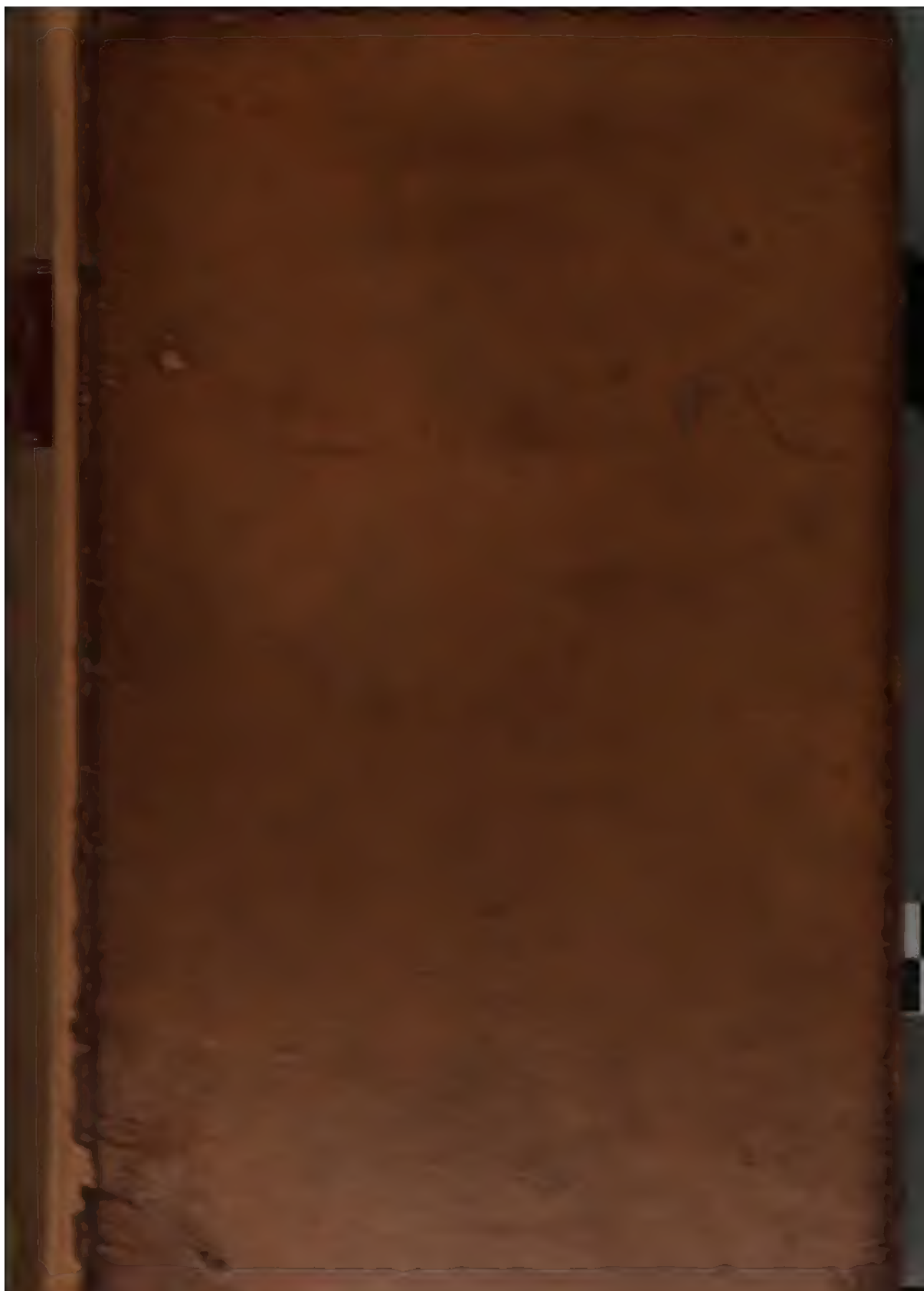
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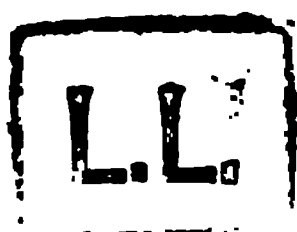
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# REPORTS

OF

## CASES

ARGUED AND DETERMINED

IN THE COURT

OF THE

*VICE CHANCELLOR OF ENGLAND,*

DURING THE TIME OF

THE RT HON<sup>BLE</sup> SIR JOHN LEACH, K<sup>NT</sup>.

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By HENRY MADDOCK, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

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VOL. V.

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1822.



**Luke Hansard & Sons, near Lincoln's-Inn Fields.**

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ERRATA.

Page 351, in marginal note, for " 1821 " read " 1820."  
288, l. 16, for " cannot " read " may."  
384, last line in note (e), for " Civile " read " Civil."



# CASES

BEFORE THE

## VICE-CHANCELLOR.



*Ex parte* WILBRAN *in re* WILBRAN.

16 Dec. 1819.  
17 Jan. 1820.

*VACHILL, Mure & Co.* had considerable Dealings with *Wilbran, Ursell, Jackson & Co.* who were largely indebted to *Vachill & Co.* Being displeased with the conduct of *Wilbran*, and convinced that if he continued in the Concern, he would ruin it, *Vachill & Co.* arrested *Ursell, Jackson & Co.* All the Partners, except *Wilbran*, put in Bail, but he remained in Prison until two months expired, and then he was made a Bankrupt by *Vachill & Co.* they continuing at the same time their Dealings with *Ursell, Jackson & Co.*—*Wilbran* petitioned *V. & Co. Creditors of U. & Co. being displeased with the conduct of Wilbran, one of the Partners in the Firm of U. & Co. they arrested U. & Co. All the Partners, except Wilbran,* put in Bail, but he continued in Prison two Months, and a Commission was issued against him by *U. & Co.*

*Wilbran* petitioned to supersede the Commission, on the ground that it was taken out for the purpose of dissolving the Partnership as to him.

Held, that a Commission is, in a sense, a legal right, and is not affected by any bye object in the Party suing it out, unless there be Fraud; and Petition dismissed.

1820.

*Ex parte*  
WILBRAN,  
*in re*  
WILBRAN.

to supersede the Commission, on the ground, that an unfair use had been made of the same, it being issued for the purpose of dissolving the Partnership, so far as respected him; and *Ex parte Broune* (a), *Ex parte Gallimore* (b), and *Ex parte Harcourt* (c), were cited.

It was not proved that there was any contrivance between *Ursell & Jackson* and *Vackill & Co.* and the latter insisted on their right to sue out a Commission if they thought fit; and although the effect of it was to dissolve the Partnership, that that was not a ground of interference, either on general equity, or as an abuse of the Commission; and to that opinion the *Vice-Chancellor* inclined, but said he would take an opportunity of conferring with the *Lord Chancellor* on the subject.

Mr. *Hart*, and Mr. *Montague*, for the Petition.

Mr. *Cullen*, and Mr. *Rose*, *contra*.

17th January. On this day, the *Vice-Chancellor* said he had conferred with the *Lord Chancellor*, and that his Lordship was pleased to concur with him in thinking, that this was not a Case for a *Supersedeas*. A Commission, he continued, was, in a qualified sense, a legal right, like an Action, and that Courts of Justice had no concern with the motives of Parties who asserted a legal right. In *Ex parte Harcourt*, the Bankrupt himself, with a view to dissolve the Partnership, procured a Commission to be issued against him. Being the Bankrupt's Commission, it could not stand. In *Ex parte Gallimore*, the Commission was used for a fraudulent purpose. That he

(a) 1 Rose, 151.

(c) 2 Rose, 203.

(b) 2 Rose, 424. S. C. on another point, *ante*, vol. i. p. 67.

## CASES IN CHANCERY.

3

fully adopted the principles of those Cases. Here, it appeared that, the petitioning Creditors, having no concert with the other Partners, desired to operate a Dissolution, considering it an advantageous measure for them that the Bankrupt should not continue in a Firm with which they had large Dealings. There was, in this, no Fraud, and it is not enough that there be a bye motive, unless there be Fraud.

Petition dismissed.

1820.

*Ex parte*  
WILBRAN,  
*in re*  
WILBRAN.

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## ANTROBUS v. EAST INDIA COMPANY.

17th January.

**I**N this Case, an Issue being directed, the Plaintiffs in the Issue, who, according to a Rule acted upon by the *Vice-Chancellor*, have the choice of the Court in which it shall be tried, were desirous to have it tried in the Court of *Exchequer*, and Mr. *Wetherell* said, that, in the *Corporation of Colchester v. Lowten*, an Issue had been directed into the *Exchequer*. The *Vice-Chancellor* having some doubt as to sending the Issue to be tried there, the matter stood over.

*Issue will not be directed to be tried in the Court of Exchequer, unless for some special reason, and on a Motion made for that purpose.*

On this day, the *Vice-Chancellor* said, that upon inquiry, he found Issues had, in very few instances, been directed to be tried in the Court of *Exchequer*, and only where there was some special inconvenience in trying them in the other Courts. The general rule, he said, was, that the Plaintiff in the Issue must elect to have it tried, either in the Court of *King's Bench* or *Common Pleas*, and that if there was any special reason for having it tried in the Court of *Exchequer*, a special Motion should be made for that purpose.

1820.

18th January.

LANCHESTER v. THOMPSON, TRICKER  
and others.

*Court will not decree a Rate to be made to reimburse a former Churchwarden Monies laid out, whilst in office, in pursuance of a Vestry order.*

ON the 13th of April 1811, the Plaintiff and the Defendant *William Tricker* were chosen Churchwardens of the Parish of *St. James*, in the Borough of *Bury St. Edmunds*, in the County of *Suffolk*, and continued in that office until the 15th April 1812. Previous to their appointment, the Tower of the Parish Church had been presented by the then Churchwardens to the Archdeaconry of *Norwich*, as in need of Repair, and some of the Church Bells, and the Lead-work and other parts of the Tower had been removed. The Plaintiff and *Tricker* summoned a Meeting of the Inhabitants of the Parish, which was held at a Vestry on the 8th July 1811, when it was ordered, that the Plaintiff and *Tricker*, as such Churchwardens, should be authorized to put a new Roof on the Tower of the Church, which Order was signed by the Plaintiff and *Tricker*, and also by several other Parishioners, some of whom were since dead. The Plaintiff and *Tricker* applied to *James Thompson*, a Builder, for a Plan for the Repair of the Tower, which he gave them; and at a Meeting of the Parish, summoned by the Plaintiff and *Tricker*, and held in Vestry on the 1st August 1811, the Model was approved of by the Plaintiff and *Tricker*, and a majority of the other Parishioners there present, who resolved, that the said *James Thompson* should put a new Roof on the Tower according to the Model, to be valued by the Builders on its completion; and that the Plaintiff and *Tricker*, as such Churchwardens, should be requested to employ such persons as they might think competent to estimate

the Injury done to the Tower and the Bells, and to employ such other Assistants as they should think proper to repair the Tower. At a subsequent Meeting of the Parish, summoned by the Plaintiff, on the 5th August 1811, at which *Tricker* was present, it was ordered, that the Plaintiff and *Tricker* should proceed for the recovery of the Church Bells, and all the Materials of the Roof taken off the Tower, as by their Attorney they should be directed. The Plaintiff and *Tricker*, under the sanction of the foregoing Orders and Resolutions, employed the Defendants, and *James Thompson* and *George Kitson*, to make the Repairs; and after the same were completed, and the Expenses incurred by the Repairs and in proceeding to recover the Value of the Bells and Materials removed from the Tower, were ascertained, a Meeting of the Parish in Vestry was summoned on the 11th January 1812, at which Meeting it was ordered, that a Rate or Assessment should be made at four shillings in the pound, amounting in the whole to 807*l.* 14*s.* upon all the Inhabitants and Occupiers of Lands, Houses, Tenements and Hereditaments within the Parish, to reimburse the Plaintiff and *Tricker* the Money so expended in repairing the Church, and other Charges and Expenses incident to their office of Churchwardens, which Order was signed by the Plaintiff, and by the Defendants *William Frewer*, *John Kitson*, and *Edward Thompson*, and several other persons, most of whom were since deceased. The Meeting was adjourned to the 14th February 1812, and at such Meeting, the Rate or Assessment which had been ordered at the former Meeting, was made by the Plaintiff and the Defendants *George Kitson* and *John Kitson*, and others of the Parishioners present, most of whom were since dead. *Tricker*, the Co-Churchwarden with the Plaintiff on the 15th December 1812, the Defendants, and

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other Parishioners, entered into an Agreement, to join in the Expense of resisting the Rate. An Appeal was accordingly entered against the said Rate in the Court of the Archdeacon of the Diocese of Norwich, and such Appeal was allowed, and the Rate quashed, upon the ground that the Rate was made at an adjourned Meeting, and not at a Meeting expressly summoned by due Notice in the Church for making the said Rate, pursuant to the Order of the 11th February 1812:—The Appeal from the Rate, as the Bill stated, was made by certain Persons in the Parish, and amongst others by the Defendants *Richard Thomas Mills* and *Thomas Cocksedge* who were desirous that the Tower should be repaired by a Mr. *Patince*, and formed themselves into a Party to oppose the Plaintiff and *Tricker* in the repair of the Tower, and contrived, after the Appeal was decided, and before the usual time allowed to the Churchwardens going out of office to settle their Accounts and raise the Money due to them from the Parish, to have new Churchwardens appointed, so as to prevent the Plaintiff having a Rate made and levied to reimburse the said Expenses.

Shortly afterwards, *James Thompson* commenced an Action against the Plaintiff and *Tricker*, in respect of his Bill for Repairs, and in July 1812, he obtained a Verdict against them jointly, for the Sum of 164 *l.* and against the Plaintiff solely for the Sum of 10 *l.* and issued an Execution against the Plaintiff, and levied thereon the Damages and Costs, amounting to 234 *l.* 4 *s.* of which Sum *Tricker* refused to pay the Plaintiff his proportion:—*Thompson* also brought another Action against the Plaintiff, in respect of his Bill for the repair of the Tower, for the Sum of 38 *l.* 19 *s.* and recovered Judgment thereon, and took out Execution against the

Plaintiff for the Damages and Costs, amounting together to the Sum of 72*l.*: and the Defendants *John Kitson* and *George Kitson* brought an Action against the Plaintiff, for their Bill in repairing the Tower, and obtained Judgment, and took out Execution against the Plaintiff for the sum of 70*l.* 18*s.* 4*d.* and Costs, amounting together to the Sum of 96*l.* and took out Execution for the same, and opposed the making of any Rate to reimburse the Plaintiff the Expenses incurred by him as such Churchwarden. The Sum of 450*l.* still remained due to several other Tradesmen in respect of the Repair of the Tower, to which the Plaintiff, as such Churchwarden, rendered himself liable, besides Law Charges, to which the Plaintiff had been subjected in his office, principally by the refusal of the Defendants to levy the Sums necessary for defraying the Expenses of the Repairs, and the Balance due to the Plaintiff in respect of the Monies paid by him under the sanction of the before-mentioned Vestry Orders, amounting to the Sum of 600*l.*—The Bill prayed, that an Account might be taken of all Sums paid by the Plaintiff, to which he had become liable for the Repair of the Tower, and of the Costs of the Plaintiff in the aforesaid Actions, and also of the Law Charges incurred by the Plaintiff in the recovery of the Church Bells, and the Value of the Lead and Materials which had been taken from the said Tower before the Plaintiff was appointed Churchwarden, and otherwise in respect of the aforesaid matters; and that the Defendants might be ordered to call, or concur in calling, or procure to be called, a Vestry Meeting of the Parishioners, to make a Rate for the payment thereof, and that the Plaintiff might by means thereof be reimbursed all Monies which he had paid in respect of the matters aforesaid, and that the Monies still remaining unpaid, and to which the Plaintiff was liable,

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might be also in like manner paid, or the Plaintiff indemnified therefrom; and that the Defendants respectively, or such of them as the Court should think proper, might be ordered to repay to the Plaintiff, or to contribute to pay to the Plaintiff, such Monies as aforesaid, and in such proportions as the Court should direct.

The Defendants, by their *Answers*, admitted they had resisted the Rate, as the Tower of the Church might, according to the Estimate of another Person, have been repaired at infinitely less Expense; and that *Tricker*, the Co-Churchwarden with the Plaintiff, was averse to the plan of Repair adopted by the Plaintiff.

The only point argued was as to the Jurisdiction of the Court to make an effectual Decree as prayed, supposing the Facts, as stated, were taken to be true.

Mr. Fonblanque, Mr. Horne, Mr. Roupell, and Mr. Parker, for the Plaintiffs:—

This is a Bill for the purpose of calling upon the Defendants to take steps for procuring a Parish Rate to be made to reimburse the Plaintiff, who, during the time he was Churchwarden, incurred considerable Expense by repairing the Tower of the Parish, in pursuance of Orders of Vestry for that purpose. The Plaintiff being no longer Churchwarden, cannot call a Meeting of the Vestry, to procure an Order for a Rate; but this Court can order the Defendants to call a Vestry for the purpose of making a Rate. In *Nicholson v. Masters (a)*, a Bill was filed against ninety Parishioners,

(a) 1 Burn's Eccl. Law, 382; Vin. Abr. tit. Churchwardens (C).

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by the Executrix of one of the Churchwardens of *Woodford*, to be reimbursed Money laid out by the Testator, as Churchwarden, for rebuilding the Steeple of the Church: it was objected, that this matter was proper for the Ecclesiastical Court, and not for this Court; “but by *Harcourt*, Chancellor, the Plaintiff is proper for relief in this Court; and there are many Precedents of the like nature: and it was decreed, that the Parishioners should reimburse the Plaintiff the Money laid out by the Testator, with Costs of this Suit, and that the Money should be raised by a Parish Rate.” That Case is in point: it was a Church Rate to reimburse a Churchwarden’s Estate in respect of rebuilding a Steeple; and Lord *Harcourt*, it must be observed, says, “*There are many Precedents of the like nature.*” A Churchwarden is bound by the Common Law to repair the Church, but it is only by Statute that he is compelled to relieve the Poor. The Court, in *Blackbourn v. Webster* (b), has even gone so far as to decree a Rate to be made to repay a Churchwarden gone out of office, Expenses which had been incurred in building a Poor House. If the Court will thus compel a Poor Rate to be made, *à fortiori*, it will, if necessary, compel a Church Rate. In *French v. Dear* (c), Lord *Rosslyn* questioned the Jurisdiction of this Court to direct a Poor Rate to reimburse a former Churchwarden; but the Counsel in the Argument, and his Lordship in his Judgment, considered a Church Rate, for the repair of the Church, as capable of being decreed. A gross Fraud was committed in resisting the Rate, and the Parties to the Agreement of the 15th of December 1812, are individually liable to remunerate the Plaintiff. The present Churchwardens are not Parties, nor was it necessary they should; being fluc-

(b) 2 P. Wms. 632.

(c) 5 Ves. 547.

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tuating persons, it would have been inconvenient to have made them Parties; and in *Bradley v. Cooke* (*d*), a Case of this kind, they were not made Parties, and no objection was taken on that ground. If the Court decrees a Rate, the Churchwardens might, by a Supplemental Bill, be made Parties. The object of the Suit is either that a Rate may be decreed, or that the Defendants may individually pay what is due. If there be any objection to the Amount claimed to be due, that will be a proper subject of consideration for the *Master*.

Mr. *Heald*, Mr. *Wray*, and Mr. *Rolfe*, for the Defendants:—

By the 41 Geo. 3, c. 23, s. 9, Overseers are empowered to make Rates to reimburse preceding Overseers; but the Law as to Churchwardens remains untouched. Churchwardens may make Rates for the reparation of the Church; but if they choose to lay out Money before a Rate has been made, and go out of office, they must suffer for their folly, for they have no means of repaying themselves. In *Blackbourn v. Webster*, the Court does not appear very confident of the effect of its Decree for a Rate, for it decrees a Rate, *or*, a Sale of the Land on which the Workhouse was built. In *Dawson v. Wilkinson* (*e*), a Sentence having been given in the Ecclesiastical Court to compel the then Churchwardens to make a Rate to reimburse the preceding Churchwardens in respect of Monies expended for the Parish, the Court of King's Bench granted a Prohibition, and in doing so, followed several previous Decisions cited in that Case, and in particular, *Tawney's Case* (*f*); the reason

(*d*) Prec. Chan. 42.

temp. Hardwicke, 381, 2d edit.

(*e*) Andr. Rep. 11; & S. C.

by Mr. Lee.

2 Lord Raym. 1009, and Cas.

(*f*) 2 Salk. 556.

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being, that Churchwardens are not obliged to expend any Money out of their own pockets. In that Case, Chief Justice *Holt* says, "We cannot order the Parish or Overseers by a *Mandamus* to make a Rate to raise Money to reimburse an Overseer." In the Note to *Dawson v. Wilkinson*, several Cases are cited: *The King v. The Chapelwardens of Bradford* (g), is there referred to; in which Case, Lord *Ellenborough* says, "The regular way is for the Churchwardens to raise the Money beforehand by a Rate made in the regular form, for the Repairs of the Church, in order that the Money may be paid *by the existing Inhabitants at the time*, on whom the burthen ought properly to fall." The Plaintiff is without remedy. Having chosen to make himself responsible before a Rate had been levied, this Court cannot relieve him; it has not the means of doing so. If any of the Parishioners disapproved of the Rate as informal or unnecessary, they had a right to object to it; they had reason to object, and were successful in their objections; they incurred no responsibility on that account. Where Churchwardens have properly laid out Money, they ought to be repaid, though they could not enforce such repayment; but if this Case were entered into, the conduct of the Plaintiff would be found very exceptionable, and such as creates no moral obligation to repay him the unnecessary Expenses he has occasioned.

The VICE-CHANCELLOR:—

A Plaintiff who comes into this Court to have a Church Rate made for his benefit, necessarily admits that his Case is such that he has no Remedy in the Courts of ordinary jurisdiction, and he is bound to make out a Special Case, entitling him to equitable Relief. In the Case before Lord *Ellenborough*, it was established that

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(g) 12 East, 556.

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no Church Rate can be legally made for the reimbursement of a Churchwarden, because that would be to shift the burden from the Parishioners at the time, to future Parishioners. The Law was the same with respect to the Poor Rate, until a late Statute. And although the Spiritual Court may compel a Church Rate for the purpose of Repair, it must follow the Law, and cannot compel a Rate for reimbursement. A Court of Equity must equally follow the Law, and it can be no ground of Relief here, that a Party has failed to use legal diligence. The only way in which it seems possible for the Plaintiff to shape a Special Case for equitable Relief, is to say, that a Vestry having authorized him to proceed in the Repair, without a previous Rate, it is against conscience that the Parish should now object to him the illegality of that Proceeding. The Vestry can be said to represent the Parish only when they act legally; and if the true construction of the Vestry Order in question, is, that the Plaintiff might proceed without first obtaining a Rate, such Order was illegal, and could create no Equity against the Parish, and the utmost effect of that Order upon such a construction, would be to raise an Equity against the Individuals concurring in it, upon the ground that they ought not to be excused from the payment of their proportion of a fair Rate, because the Plaintiff, relying upon their Authority, had neglected to obtain a previous Rate. If, however, such an Equity could be maintained, the Bill is not framed for such a purpose, nor are the Persons concurring in that Vestry Order made Parties to it. Upon these principles, the Parishioners, who opposed the making of a new Rate for the Plaintiff, were well justified both at Law and in Equity; but if it were possible to raise an Equity against the Parishioners who opposed the satisfaction of the Plaintiff's demand, all

the Parishioners who were Parties to the written Agreement must be brought before the Court, and not two or three Individuals only. Where it is attempted to proceed against two or three Individuals, as representing a numerous Class, it must be alleged that the Suit is brought against them in that character, which is not the case here.

Bill dismissed, with Costs.

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v.  
THOMPSON  
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KING v. NOEL.

20th January.

A MOTION had been made in this Case, in the last Term, to dismiss the Bill for want of Prosecution. The Clerk in Court, upon being applied to, some days after the Motion, for his Certificate as to no Proceedings, certified the last Proceeding *before* the Motion, which took place more than three Terms previous, and then stated a further Proceeding two days *subsequent* to the Motion. The *Registrar* objected to draw up the Order on this Certificate; and upon the matter being mentioned in Court, the *Vice-Chancellor*, after consultation with the *Registrar*, stated, that the Clerk in Court was bound to certify explicitly that there had been no Proceedings for three Terms prior to the day of Motion, but that this Certificate need not be made prior to the Motion (a); and that he ought not in his Certificate to refer to any Proceeding subsequent to the Motion.

*On a Motion to dismiss for want of Prosecution, the Clerk in Court, in his Certificate as to Proceedings in the Cause, (which may be obtained after the Motion is made,) must not state any Proceedings subsequent to the Motion.*

(a) *Wills v. Pugh*, 10 Ves. 12 Ves. 465; and see 1 Ves. 402. *M'Mahon v. Sisson*, & Bea. 368.

1820.

21st January.

## COUPLAND and others v. BRADOCK.

*After an Order to elect whether the Plaintiff will proceed in Equity or at Law, the Plaintiff cannot, on a Motion of course, move for leave to file Exceptions, nunc pro tunc, but ought to make a special Application for that purpose, and for an Order to suspend the Election until the Exceptions are answered.*

A MOTION was made to discharge an Order in this Cause for leave to file Exceptions *nunc pro tunc*, as being irregularly obtained.

The Defendant put in his Answer on the 18th September 1819, and after the expiration of eight days in Michaelmas Term, viz. on the ninth day of the Term, 15th November 1819, obtained an Order "That the Plaintiffs, their Clerk in Court, and Attorney at Law, having Notice thereof, should within eight days after such Notice, make their election in which Court they would proceed; and if the Plaintiffs should elect to proceed in this Court, then their Proceedings at Law were thereby stayed by Injunction, but if the Plaintiffs should elect to proceed at Law, or in default of such election by the time aforesaid, then the Plaintiffs Bill was from thenceforth to stand dismissed out of this Court, with Costs, to be taxed by the *Master*." This Order was left with the *Registrar* to be drawn up, but owing to the press of business could not be obtained until the 22d December, and was not passed and entered until the 24th, on which day it was served on the Clerk in Court of the Plaintiff, and on his Attorney at Law. The *Registrar's* Office closed on the 24th December, and did not open until the 7th of January 1820. On the 3d of that same January, the Defendant's Attorney was served with a Notice dated 1st January 1820, signed by the Plaintiffs Attorney, stating that Exceptions had been taken to the Answer, and that the Order for liberty to file them would be served as soon as the Offices opened; to

which the Defendant's Solicitor replied that he considered the Plaintiff's Bill as dismissed, with Costs, to be taxed, under the Order of the 15th November 1819.

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On the 10th January 1820, the Order for liberty to file Exceptions *nunc pro tunc* was served.

Mr. *Agar*, and Mr. *Duckworth*, in support of the Motion :—

The Order was, that in default of an election within eight days, the Bill should be dismissed, with Costs, to be taxed. No election was made within the eight days. The Bill therefore stands dismissed. The Order referring the Exceptions *nunc pro tunc*, was not served until some days after the expiration of the eight days, within which the Party was to elect.

Mr. *Bell*, *contra* :—

A Plaintiff cannot be put to an election until the time for excepting to the Answer has expired (*a*). The question then is, if Exceptions to the Answer *nunc pro tunc* are filed before the expiration of eight days, within which the election is ordered to be made, that is a sufficient ground to stay the election, until the Exceptions are answered? In the Case of Injunctions, Exceptions to the Answer are a sufficient Answer to a Motion to dissolve the Injunction. In fact, we could not elect within the eight days, because the Office was not open. If Exceptions are taken before an application for an Order to elect, the Order cannot be obtained until the Exceptions are answered; and if after an Order to elect, Exceptions are taken, it seems upon principle, that the taking Exceptions suspends the Order to elect until the Exceptions are answered.

(*a*) See *Browne v. Poyntz*, *ante*, vol. iii. p. 24.



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v.  
BRADOCK.

The VICE-CHANCELLOR:—

A Party is certainly entitled to a full Answer before he can be compelled to elect; but if no Exceptions are taken to the Answer within eight days after it is put in, it is to be assumed, that the Plaintiff is satisfied with the Answer; the Defendant may then move, that the Plaintiff may be put to his election, and the Plaintiff cannot afterwards suspend the Order of election, by moving as of course, within the eight days, for leave to file Exceptions *nunc pro tunc*. In such case, he should make a special application to suspend the Order for an election. The Order for leave to file Exceptions *nunc pro tunc* must be discharged, with Costs; but let the Order to elect be suspended, until the first day of Motions in Term, with liberty for the Plaintiff to make such application on that day, for leave to file Exceptions, as he may be advised.

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SAMPSON v. SWETTENHAM.

Same day.  
*Production of  
a Deed, which  
destroys the  
Defendant's  
Title, refused.*

MR. PARKER moved for the production of a Deed referred to in the Defendant's Answer, upon which he founded his Title.

Mr. Bell, *contra*.

The VICE-CHANCELLOR:—

The Plaintiff is entitled to the production of a Deed which sustains his Title, but he has no right to the production of a Deed which is not connected with his Title, and which gives Title to the Defendant.

Motion refused.

HAWKES v. BARRETT and another :  
WILLIAMS v. BARRETT and another.

1820.

24th January.

A MOTION was made, that the Proceedings in the second Cause might be stayed, or that *Hawkes*, the Plaintiff in the first Cause, might be let in to prosecute the second Cause on behalf of herself and the other Creditors and Legatees of *E. B.* deceased. On the 15th November 1819, Mrs. *Hawkes* filed her Bill against *Barrett* and *Cannon*, as Executors of *Hawkes*, deceased, for the usual Accounts: she was both Creditor and Legatee. On the 30th November, the Defendant appeared to that Suit, and took an Order for time; and on the 15th December *Williams* filed her Bill, as her Creditor, against the same Defendants. To this Bill, an amicable one, the Defendants immediately put in their Answer. On the 22d December the Cause was set down, and a Decree taken. One of the Executors, *Barrett*, was also Residuary Legatee, and the Decree directed an Account of the Legacies, and to ascertain the residue, and was so taken at his instance. The other Executor, *Cannon*, was the Solicitor both for the Plaintiff and Defendants in the second Cause. Mr. *Lovat*, on the Motion, urged the impropriety of the same Solicitor acting both for Plaintiff and Defendant, more especially as such Solicitor was one of the Executors, and therefore an accounting Party. He submitted, the second Cause ought not to be allowed to proceed; or that if the second Cause proceeded, the Plaintiff in the first, ought to have the management of it.

*There being two Suits to take Executors Accounts, the prosecution of the first Suit was, under the circumstances, stayed, and the prosecution of the Decree in the second Suit was given to the Plaintiff in the first Suit.*

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HAWKES  
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Mr. Rose, *contra*, contended, that the Court looked favourably to the Executor in these kind of Suits, in order to give him a protective Decree, as early as possible; that if there were any impropriety, the Court would fasten upon that, but not upon the mere circumstance of the same person being Solicitor in both Causes.

The *Vice-Chancellor* made an Order to stay the Proceedings in the first Cause, and to give to the Plaintiff in that Cause, the prosecution of the Decree in the second; and directed the Costs in the first Cause to be paid out of the Estate.

1820.

CARDALE v. WATKINS.

21st January.

*Demurrer lies to a Bill of Discovery merely, unless, in aid of proceeding, either pending or intended, alleged in the Bill.*

A BILL was filed merely for a Discovery, but stated no purpose for which the Discovery was sought. A Demurrer was put in, and allowed; the *Vice-Chancellor* observing, that a Court of Equity does not compel Discovery for the mere gratification of curiosity, but in aid of some other proceeding either pending or intended, and that there must be Allegations to that effect.

Mr. Roe, for the Demurrer.

Mr. Horne, *contra*.

HOW v. BEST and HASE.

26th January.

**I**N this Case, an Officer of the Bank of *England* was made a Party for the purpose of discovery as to the times when Stock in question in the Cause had been transferred.

*Demurrer by an Officer of the Bank allowed, upon the ground, that as to the Discovery sought*

He demurred to the Bill, and the *Vice-Chancellor* allowed the Demurrer, stating, that the Officer was in this case merely a Witness.

*from him he was merely a Witness.*

ATKINS v. PALMER.

1820.

4th February.

**I**N this Case a Bill had been filed for a Commission to examine Witnesses abroad, in aid of a Trial at Law, and a Commission had been sent out accordingly, but the Witness had returned to *England* before the Commission had reached its destination, and the present application was to examine the Witness *de bene esse*, in aid of the Trial at Law, upon the ground, that he was about to leave the Country again before the Trial could be had.

*After a Commission sent abroad for the Examination of Witnesses, a Witness, before the Commission had reached its destination, returned to Eng-*

The *Vice-Chancellor* observed, that this was a different relief, and that the Bill must be amended.

*land, and a Motion was made to examine him, de bene esse, but refused; and held, that the Bill must be amended.*

Motion refused.

*held, that the Bill must be amended.*

1820.

## RIGBY v. EDWARDS.

4th February.

*Items in a Solicitor's Bill were charged to the Plaintiff in respect of the Defence of a third Person, at the Plaintiff's request.*

*The Solicitor did not show that he was employed in such Defence by the Plaintiff, and the Items were struck out; and held, that such Items were to be computed among the Deductions, for the purpose of determining upon whom the Costs of the Taxation were to fall.*

IN this Case, an Order had been obtained by the Plaintiff, for the Taxation of his Solicitor's Bill, which, amongst other things, contained a set of Items which were charged to the Plaintiff, upon the ground, that though they respected the Defence of a third Person in an Action to which the Plaintiff was no Party, yet the Solicitor was employed in such Defence by the Plaintiff, and not by the Defendant himself. The *Master* being of opinion, that the Solicitor had not established the fact that he was employed in such Defence by the Plaintiff, struck out those Items; and the question was, Whether the amount of the Items so struck out, was to be computed among the Deductions, for the purpose of determining upon whom the Costs of Taxation were to fall?—For the Solicitor, was cited, the Case of *White v. Milner* (a), where it was held, that a Sum deducted in respect of the Attorney not proving the undertaking of the Plaintiff to pay a Bill of Costs due to him from a third Person, was not to be computed as a Deduction for the purpose of the Costs of Taxation.—The Case stood over, in order that the Practice might be inquired into, and on this day, the *Vice-Chancellor* stated, that he had received a Certificate from the most experienced Clerks in Court, and that they were of opinion, that Sums deducted in respect of business done for a third Person at the alleged retainer of the Client, but the Authority not proved, were always computed as Deductions in the question of Costs

(a) 2 Hen. Bl. 357.

of Taxation. The *Vice-Chancellor* further stated, that the principle appeared to be, that whenever Items in a Bill of Costs would be properly taxable if the facts alleged by the Solicitor were true, and the items were deducted because he had not established those facts, the amount would reckon as a Deduction in the question of Costs of Taxation. That in the Case in *Blackstone*, the Items would not have been taxable between the Solicitor and Client, assuming the statement of the Solicitor to be true, because there the Client was only alleged to be a Surety for the payment of the Bill, which could not be taxed behind the back of the Principal.

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RIGBY  
v.  
EDWARDS.

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ELLIS v. KING.

THE Defendant set down the Cause, and the Solicitor for the Plaintiff undertook to appear, without having a *Subpœna*, to hear Judgment. When the Cause came on, the Plaintiff did not appear. The *Vice-Chancellor* held, the Bill could not be dismissed for want of an Affidavit that a *Subpœna* to hear Judgment had been served on the Plaintiff, and that the Cause could only be struck out of the Paper; but said, that on an application for that purpose, the Solicitor for the Plaintiff would be made to pay the Costs occasioned by his default of appearance. 5th February.

JAMES BELL, JOHN BELL, and SARAH BELL

Spinster - - - - - Plaintiffs ;

and

THOMAS COLEMAN - - - - - Defendant.

1820.

5th February.

*Testator bequeathed 400 l. to Trustees, to pay the Interest to his Daughter, a married woman, for her sole use during her life, and then to pay the same to her Husband for his life, and after his death to pay the Principal to their Children on attaining 21.*

*It appeared by Evidence, that the Testator afterwards advanced 100 l. to the Husband of his Daughter, and that he gave a Receipt for the same, expressing*

*it to be as part of the portion of his Wife ; and the Testator inclosed the Receipt, together with his Will, in an Envelope ; and that since the Wife's death the Husband had received only Interest on 300 l. for many years. Held, that the Gift of the 100 l. was not an ademption, pro tanto, of the Legacy by the Will.*

**THOMAS COLEMAN** by his Will, 20th June 1783, gave to his two Sons, *Thomas Coleman*, the Defendant, and *Henry Coleman*, and to *Joseph Cook*, 400 l. in Trust that they or the Survivor, his Executors or Administrators, should place the same out at Interest, on Government or Real Securities, and pay the annual Interest and Proceeds unto his Daughter, *Sarah Bell*, (since deceased), then the Wife of the Plaintiff, *John Bell*, for her life, for her separate use, and after her death, upon further Trust, to apply such Interest and Proceeds unto the Plaintiff, *James Bell*, for his life, and after his decease, to apply the 400 l. and the Interest thereof and thereon to arise from the death of the Plaintiff, unto and amongst all and every the Children of *Sarah Bell* that should be living at her death, equally to be divided between them, to be paid as they should attain twenty-one ; and if only one Child, the whole to such Child at twenty-one.

The Testator died in June 1789, leaving him surviving *Sarah Bell*, his Daughter, and also her three

Children, viz. *James Bell*, the younger, (since deceased,) and the Plaintiffs, *John Bell*, and *Sarah Bell*, Spinster.

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BELL  
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The Testator's Assets were more than sufficient for the payment of his Debts, Funeral Expenses, and Legacies. *Sarah Bell*, the Mother, died 19th December 1794, leaving her surviving her Husband the Plaintiff, *James Bell*, and also her Children, *James Bell*, the younger (since deceased), and the Plaintiffs, *John Bell* and *Sarah Bell*, her only Children.

*James Bell*, the Father, administered to his Son *James Bell*. A Bill was filed by the Plaintiffs against the Defendant as surviving Executor and Trustee, stating the foregoing facts, and insisting that the Sum of 400*l.* ought to be invested for their benefit, and the Interest paid to the Plaintiff, *James Bell*, during his life; and the Prayer of the Bill was accordingly, and for the usual Accounts.

The Defendant, by his Answer, stated, that after the execution of the Will, the Testator paid to the Plaintiff, *James Bell*, the Sum of 100*l.* in part satisfaction of the Legacy of 400*l.* and submitted that the same was an ademption, *pro tanto*, of the Legacy, and that he was not bound to pay more than 300*l.* the Interest whereof, at five per cent, had been paid to the Plaintiff, *James Bell*, since the decease of his Wife, until October 1817; and that he had invested 300*l.* in the purchase of Three per cent. Consols, and had offered to make a declaration of the Trusts of the same. The Defendant went into Evidence, and proved a Receipt given by the Plaintiff, *James Bell*, to the Testator, bearing date the 3d August 1786, whereby he acknowledged to have



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received 100*l.* part of the Portion of his Wife. The Receipts by *James Bell*, the Plaintiff, in respect of Interest at five per cent. on 300*l.* since his Wife's death, were proved. There was also Evidence in the Cause, that *Mary Bates*, a Servant of the Testator, who had since become incapable of giving Evidence, being imbecile of mind, informed the Witness, that the Receipt for 100*l.* given by the Plaintiff, *James Bell*, to the Testator, was found in an envelope, under seal, together with the Will.

Mr. *Heald*, and Mr. ——— for the Plaintiffs.

Mr. *Bell*, and Mr. *Twiss*, for the Defendant.

The VICE-CHANCELLOR :—

*Primâ facie* this advance to the Husband is not a satisfaction, *pro tanto*, of the Legacy given by the Will to the Testator's Daughter, because the nature of the Gift is different from the Legacy, which is to the Wife for life, then to her Husband for life, and afterwards to the Children. Evidence, however, is admissible, to prove that it was meant to be a satisfaction, *pro tanto*; but the Evidence in this Case does not satisfactorily establish that intention. The Receipt, it is true, is for 100*l.* part of the Portion of his Wife, but it does not appear that the Husband had at that time any knowledge of the Legacy; and any advance which a Father makes to his Daughter may well be called a part of her Portion, and be consistent with an intention that the Legacy given by the Will should not be disturbed. The circumstance of the Receipt being inclosed with the Will affords no certain conclusion. In *Thellusson's*

Case (a), there was decisive Evidence that the Testator intended that the India Stock given in his life-time should be considered as part satisfaction of the Legacy which he had bequeathed to his Daughter and her Children by his Will.—Let the Defendant transfer into Court the 300*l.* invested in 3 per cent. Consols, together with 100*l.* in addition, and account for the Interest at 4 per cent. due from the death of the Plaintiff's Wife, (during whose life the Interest was regularly paid), taking Credit for the Sums paid already by way of Interest, together with Costs.

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(a) *Ante*, vol. iv. p. 420.

FITZGERALD v. JERVOISE and others.

*JANE JOYE* bequeathed to Sir *J. Pocock*, and *George Burley*, the sum of 3,000*l.* upon Trust to invest the same in the Funds, or at Interest upon Government or Real Securities, and to pay the Interest, Dividends or annual Produce, to her Niece *Mary Fitzgerald* during her life, for her sole and separate use; and after her decease, to pay the same to *Frances Purcell* during her life, for her sole and separate use; and after her decease, to pay and assign the Trust-Monies, Stock and Securities, and the Interest, Dividends and annual Produce, unto and among all and

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*Devise of an Estate to Trustees, to sell the same, without fixing any time for that purpose, and to apply the Interest on the Monies to arise by the Sale to the use of the Plaintiff for life, and then over.*

*The Estates continued unsold, and the Plaintiff, as the Heir at Law, claimed the Rents and Profits of the Estate for the first year after the death of the Testatrix, as being undisposed of; and held, that he was entitled to the same.*

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every the Child and Children of *Frances Purcell*, equally to be divided amongst them, at the ages, and with such benefit of survivorship as therein mentioned. The Testatrix gave also the further sum of 1,000*l.* to invest the same on Government or Real Securities, in Trust to pay the Dividends, &c. to the said *Frances Purcell* during her life, for her sole and separate use; and after her decease, to stand possessed of the 1,000*l.* and the Stocks, &c. in which the same were invested, and the Interest, Dividends, &c. in Trust for the Child or Children of the said *Frances Purcell*, in the same manner as directed as to the 3,000*l.* Legacy. The Testatrix also gave and devised unto *G. P. Jervoise, Gilbert Knowler, Charles Berkley*, and *G. Burley*, their Heirs and Assigns, all that her Castle and Manor of *Bennefield*, in the County of *Northampton*, and all the Rectory and Advowson of *Bennefield*, and other Estates, particularized in the Will, to hold the same, subject to the Life Estate of Dame *Anne Pocock* therein, to the use of the said Trustees, their Heirs and Assigns, upon Trust, with all convenient speed after the death of the said Dame *Anne Pocock*, to sell the same either entirely, or in parcels, and out of the Monies arising from such Sale, to pay unto Sir *J. Pocock* and *G. Burley*, the sum of 15,000*l.* with Interest for the same after the rate of 5 per cent. from the decease of Dame *Anne Pocock*, and that the same should be laid out in the Public Stock or Funds, or on Real Securities, and the Interest &c. paid to the said *Frances Purcell* for her sole and separate use in the manner therein mentioned, and after her death to stand possessed of the said 15,000*l.* and the Stocks, Funds and Securities on which the same should be invested, and the Interest, &c. upon such Trusts, for the benefit of the Child and Children of said

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*Frances Purcell* as were expressed as to the before-mentioned Legacy of 1,000*l.*; and if no Child of *Frances Purcell* should become entitled, in Trust for the Plaintiff, his Executors and Administrators; and after directing the Trustees to pay, out of the Monies arising from such Sale as aforesaid, some other Legacies, with Interest at 5 per cent. from the decease of Dame *Anne Pocock*, the Testatrix gave all the residue and surplus which should remain of the Money to be produced by the said Sale or Sales, upon Trust to lay out and invest the same in their names, in the purchase of Public Stocks or Funds, or Government or Real Securities, and pay the Interest, &c. to Plaintiff and his Assigns for his life, and after his decease, to pay, transfer and assign the Trust-Monies, &c. unto and among all and every the Children and Child of the Plaintiff, begotten or to be begotten, equally to be divided amongst them, in the manner mentioned in the Will; and in case Plaintiff should have no Child, upon Trust, during the life of the said *Mary Fitzgerald*, to pay the Interest and annual Produce of the said Trust-Monies, &c. for the separate use of the said *Frances Purcell*, in manner therein mentioned; and after her decease, to stand possessed of the surplus or residue of the Money to arise by the Sale of the said real Estates, and the Stocks, &c. in Trust for the Children or Child of said *Frances Purcell*, in the same manner as before expressed as to the Legacies of 1,000*l.* and 15,000*l.*; and if no Child should become entitled, in Trust for such Person or Persons as would be entitled under the Statutes made for the distribution of Intestates Effects, at the decease of the said *Frances Purcell*, to her personal Estate, if she had died intestate, and without having been married.

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The Bill then stated, that the Testatrix died 30th November 1810, and that Dame *Anne Pocock* died on the 6th July 1818, and thereupon the Trustees entered into possession of the Estate devised to them, and retained the Rents and Profits which accrued in the first year after the death of Dame *Anne Pocock*, ending on the 6th July 1819, which amounted to 3,152*l.* 15*s.* 6*d.* and that the Trustees had not yet sold any part of the said Estates and Premises:—That the Plaintiff had at present no Child, and that *Frances Purcell* had eight Children, all Infants. The *Prayer* of the Bill was for an Account of the Rents and Profits of the Estate devised to the Trustees, and which had accrued in and for the first year since the decease of the said Dame *Anne Pocock*, and of the outgoings; and that the clear Rents and Profits of the said Estates which had accrued in and for the first year, since the decease of the said Dame *Anne Pocock*, might be decreed to be paid to the Plaintiff.

The question was, Whether, according to the true construction of the Will, the clear Rents and Profits of the Estates which accrued in the first year after the decease of Dame *Anne Pocock*, after paying the Interest of the 15,000*l.* were to be considered as part of the Capital of the said Trust Estate, or belonged to the Plaintiff?

Mr. *Heald*, and Mr. *Treslove*, for the Plaintiff, contended, that he was entitled under the Will to the clear Rents of the Estates which accrued in the first year after the death of the Testatrix; and they cited *Sitwell v. Barnard* (a).

(a) 6 Ves. 520.

Mr. *Hart*, and Mr. *Barber*, for the Defendants, insisted, that the Rents and Profits of the Estate formed part of the Capital of the Trust Estate, to be invested together with the clear residue or surplus of the Monies to arise from the sale of the Estates, and that the Plaintiff was entitled only to the Dividends or Interest of the Money; and they cited *Stewart v. Bruyere* (b).

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The VICE-CHANCELLOR:—

This Testatrix has directed her Trustees to sell the Estate in question, with all convenient speed after the death of Lady *Pocock*, and out of the Monies to arise from the Sale, she gives certain Legacies, with Interest from Lady *Pocock's* death, and the residue of the Monies she directs to be invested for the benefit of the Plaintiff for his life, with Remainder to his Children. The Sale having been delayed by the Trustees, the question is, At what time is the Life Interest of the Plaintiff to commence? *Primâ facie*, a Court of Equity considers that to have been done which ought to have been done; and a direction to sell a real Estate with all convenient speed after Lady *Pocock's* death, is *primâ facie* a direction for an immediate Sale. Here the circumstances are evidence that such was the actual intention. This Testatrix had not in her contemplation that intermediate Rents could arise. She has directed Interest, from Lady *Pocock's* death, on the Legacies, to be paid, not out of the Rents, but out of the Trust-Monies; and it is a reasonable inference, that as those who take interests for life in part of the produce of the Sale, take expressly from the death of Lady *Pocock*, so the Testatrix intended that the Plaintiff, who takes for life the residue of the produce of the Sale, should take equally from

(b) Stated in Note to 6 Ves. 529,

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Lady Pocock's death. My Opinion, therefore, is, that the Defendant is entitled to the Surplus Rents and Profits from the death of Lady Pocock, after keeping down the Interest of the Legacies.

If it could have been considered in this Case, that the Testatrix died intestate as to the interim Rents and Profits before Sale, then the Plaintiff would have equally taken them as Heir at Law.

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The Decree was for an Account of the Rents and Profits of the real Estate of *Jane Joye*, the Testatrix, accrued since the death of Dame *Anne Pocock*, by the Defendants *Jervoise*, *Berkley* and *Burley*, and of the Sums paid by them out of the same for Interest of the several Sums directed by the Will to be paid out of the Monies to arise by Sale of the Estates, and to "pay to the Plaintiff the clear Surplus of the said Rents and Profits, after such deduction as aforesaid; and it is ordered, that all Parties be paid their Costs of this Suit, to be taxed by the *Master*, out of the Testatrix's Estate; and any of the Parties are to be at liberty to apply to this Court, as there shall be occasion."

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February.

PRATT v. HOLEBROOK.

Where, after  
Issue joined,  
an Amendment of  
the Bill became  
necessary, an  
Order was made,  
on a Motion by  
the Defendant, that the Plaintiff should amend within a fortnight, or that his Bill should be dismissed.

THE present Motion was to dismiss for want of Prosecution, upon the ground of improper delay. The Plaintiff's Counsel objected, that a Bill was never dismissed for want of Prosecution after Issue joined, because the Defendant could proceed.

The *Vice-Chancellor* observed, that the Defendant could not proceed here, for that the only proceeding was by amendment of the Bill, which must be the act of the Plaintiff; and made an Order, that he should amend within a fortnight, or that his Bill should be dismissed, stating, that the indulgence afforded to the Plaintiff by the opportunity of amending his Bill, was not to lead to indefinite delay.

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EDMUNDS v. ACLAND.

THE Plaintiff filed his Bill to carry into effect the Trusts of a Deed, and obtained a Decree. The first Trust of the Deed, was to indemnify a Surety against the Debts of the Grantor, and the Plaintiff claimed an Interest in the Surplus. The Decree directed an Account of the Debts for which the Surety was liable, and certain Persons claimed before the *Master*, and were found by him to be such Creditors. One of those Persons now moved the Court, to be at liberty to prosecute the Suit, on the ground of delay in the Plaintiff. The Plaintiff's Counsel objected, that the Party making the application was interested only in the first part of the Decree.

12th February.

*A Creditor coming in under a Decree, permitted to prosecute the same on account of delay, though only interested in the first part of the Decree, and not in the whole of it, as the Plaintiff was.*

The VICE-CHANCELLOR:—

This Creditor having come in under this Decree, is not now at liberty to institute a new Suit, and he will be without remedy, unless this application be granted. When this Creditor has so far proceeded in the Suit, that the Creditors are paid, any Person interested in the further prosecution of the Suit may apply.



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RANKING and another v. BARNARD and others.

*Legacy of 1,000l. to Wife of J. A. who was largely indebted to the Testatrix, J. A. becomes Bankrupt, and his Wife afterwards dies, without having asserted any claim in respect of this Legacy. The Assignees of J. A. claim the Legacy. Held, that the Executors of the Testatrix are entitled to retain the Legacy in part discharge of the Debt due to the Testatrix.*

**SARAH GRACE**, who died in August 1815, bequeathed to her Daughter *K. F. Ansley*, the Wife of *John Ansley*, 1,000l. *Barnard* and *Earnshaw*, the Executors of *Sarah Grace* (two of the Defendants) proved her Will. On the 2d March 1816, before the Legacy was paid, *John Ansley* became a Bankrupt, and the Plaintiffs were chosen Assignees. On the 15th September 1817, before the Legacy was paid, *K. F. Ansley* died, leaving several Children (four of the Defendants), and having, in pursuance of a Power for that purpose over other Money given to her by the Will of her Mother, made her Will, appointed *Benjamin Ansley* and *E. R. Comyn* (two other of the Defendants), her Executors, to whom she bequeathed 6,000l. given to her by her Mother *Sarah Grace*, upon certain Trusts, in favour of her Husband and Children. The Plaintiffs, under these circumstances, filed their Bill for the payment to them, as Assignees of *John Ansley*, of this Legacy.

*Barnard* and *Earnshaw*, by their Answer, stated, that previously to and at the time of issuing the Commission against *John Ansley*, he was indebted to the Testatrix, *Sarah Grace*, in the Sum of 27,000l. and that as *John Ansley* was entitled, in right of his Wife, to the Legacy of 1,000l. they were authorized to set off the same, so far as it would extend, or to retain the Legacy of 1,000l.

*Benjamin Ansley* and *E. R. Comyn*, and the Infants,

also, by their Answer submitted, that under the circumstances, the Executors of *Sarah Grace* ought to retain the Legacy of 1,000*l.* claimed by the Bill in part discharge of the Debt due to them, as such Executors, from the Estate of *John Ansley*.

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Mr. *Pepys*, and Mr. *Barber*, for the Plaintiffs, contended, that as the Husband was entitled to this Legacy in right of his Wife, his Assignees were invested with his rights, and that it was not a Case in which the Executors were authorized to retain. They cited *Whitaker v. Rush* (a).

Mr. *Hart*, Mr. *Bell*, and Mr. *Glyn*, for the Defendants, relied principally on *Jeffs v. Wood* (b); in which, Assignees of a Bankrupt, to whom a Legacy had been left, filed a Bill for the same, and the Bankrupt being indebted to the Testator, and also to the Executor on his individual account, it was held, that the Assignees were only entitled to so much of the Legacy as remained after deducting what was due to the Testator, and to the Executor. They cited also *Ex parte Fish* (c), and *Ex parte Blagdon* (d), from which Cases they concluded, that the Executors might retain this Legacy in part discharge of the Debt due from the Bankrupt to the Testatrix.

The VICE-CHANCELLOR:—

My present impression is, that this Legacy might have been retained by the Executors, if there had been no Bankruptcy, and that the Assignees can only stand in the situation of the Bankrupt; but I will look into the Cases.

(a) Ambl. 407.

(c) MS.

(b) 2 P. Wms. 128.

(d) 2 Rose, 249.

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On the 21st February, the *Vice-Chancellor* gave Judgment.—

The view I took of this point is confirmed on looking into the Cases. In *Jeffs v. Wood (e)*, the Judgment of Sir *J. Jekyll*, is in strict conformity with the Opinion I before expressed. A Legacy to the Wife is at Law a Legacy to the Husband; but in Equity it is subject to a claim of the Wife for a provision out of it for herself and Children. This Lady has died without asserting such a Claim; and the Legacy being discharged of her equity, would have become the absolute Property of the Husband, if there had been no Bankruptcy. It is clear, that as against the Husband, the Executors of the Testatrix would have had a right to satisfy the Legacy, by writing off so much of the Debt due from the Husband to the Estate of the Testatrix, and they must have the same right against the Assignees of the Husband.

The Bill, therefore, must be dismissed, but without Costs. The Plaintiffs will retain their Costs out of the Bankrupt's Estate.

(c) 2 P. Wms. 128.

21st February.

MEADOWS v. TANNER.

*Estates were put up to Sale, and in the Particulars of Sale it was stated they were to be Sold "without Reserve."* THIS was a Bill for a specific Performance, against a Vendee of a Freehold and a Copyhold Estate, for the Sum of 1,590*l.* which Estates were put up to Sale by

*The Vendors employed a Puffer, who actually bid at the Sale. Held, that a Bill for a specific Performance would not lie against the Purchaser at such Sale.*

Auction, the Particulars of Sale stating, among other things, " that the Estates were to be sold without reserve."

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The Defendant, by his Answer, amongst other objections to the Purchase, stated, that the Estates did not correspond with the description in the Particulars of Sale; and further, that he had been informed and believed, that at the Sale, several Persons were employed by the Plaintiffs, or the Auctioneer on their behalf, to bid for the said Premises, for the purpose of preventing the same being sold without reserve, and enhancing the Price thereof; and that such Persons, or some of them, actually bid for the same, without any intention of buying for themselves, but merely with a view to raise the Biddings of Defendant, who, as he believed, was the only real Bidder at the Sale.

The Defendant also entered into Evidence, to show, that the Estates did not in many essential particulars correspond with the Particulars of Sale; and the Auctioneer in his Deposition stated, " that he did not employ any Person to bid for the said Messuage and Premises at the Sale thereof; but that the Plaintiffs employed a Person of the name of *Heaver* to bid for the said Messuage and Tenement at the said Sale, and that at such Sale *Heaver* and several other Persons bid, and that *Heaver* bid on behalf of the Plaintiffs, without any intention of becoming a Purchaser, unless for the Person by whom he was employed; but whether such Bidding by *Heaver* advanced the Price of the Estates upon the last actual Bidding for the same, before any subsequent Bidding had been made, or whether he

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did or not in the course of the Sale declare a Bidding for the said Messuage and Premises when no Bidding was made, the Deponent could not at that distance of time recollect."

Mr. *Bell*, and Mr. *Brewer*, for the Plaintiffs:—

If there was any difference between the actual state of the Premises and the description of them in the Particulars of Sale, such difference was obvious and visible, and such as the Purchaser was enabled to judge of himself, and of which he was or might have been fully acquainted before he determined to purchase:—there was no latent defect. The objection as to employing a Bidder at the Sale, will not hold. The words "without reserve," in the Particulars of Sale, meant only, that it would be peremptorily sold, and not that the usual precautions used at all Sales should not be employed. Only one Person was employed to bid for the Premises; he did bid; but whether he enhanced the Price to the last Bidder is not proved. Suppose the Defendant bid 1,000*l.* and *Heaver* bid 1,100*l.* and real Bidders advanced the Bidding to 1,500*l.* and then the Defendant bid 1,590*l.* at which it was knocked down to him, could it be said the Bidding of *Heaver* advanced the Price to the Defendant?

Mr. *Heald*, and Mr. *Swanston*, for the Defendant:—

There are many objections to the completion of this Purchase; but we rely on the conclusive objection, that this Estate was stated in the Particulars of Sale, to be set up to Sale "without reserve," and that notwithstanding that representation, the Plaintiffs employed a Puffer. The meaning of those words is not merely

that it shall be peremptorily sold, but that Puffers will not be employed at the Sale. In *Bramley v. Alt* (a), the *Lord Chancellor* says, "I have no doubt that if there were none but Puffers, and a Person was induced by that method to give more than the Value, neither Courts of Law, nor Equity, would support it." In *Connolly v. Parsons*, cited in a note to *Bramley v. Alt* (b), the Particulars of Sale did not contain the words "without reserve;" nor was that the case in *Smith v. Clarke* (c). In the present Case it is proved, that *Heaver* bid at the Sale at the instance of the Plaintiffs, and that he did not bid for himself. He was a resident near the Estate, and a Purchaser knowing that, might be induced to offer more. It was a contrivance to enhance the Biddings. The Defendant, in his Answer, states his belief, that there were no real Bidders at the Sale except himself.

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The VICE-CHANCELLOR:—

The plain meaning of the words "*without reserve*," in a Particular of Sale, is, that no Person will be employed to bid on behalf of the Vendor, for the purpose of keeping up the Price. Here a Person has been employed on behalf of the Vendor to keep up the Price, and the Vendor can have no claim to the aid of a Court of Equity to enforce a Contract against the Defendant into which he may have been drawn by the Vendor's want of faith.

Bill dismissed, with Costs.

(a) 3 Ves. 364.      (b) 3 Ves. 625.      (c) 12 Ves. 477.

1820.

## NOEL v. HOY.

22d February.

*The nomination by a Will of the Testator's Wife as Executrix "thereby bequeathing to her all the Property of whatever description or sort that I may die possessed of, &c." held to pass a Copyhold Estate belonging to the Testator, which he had surrendered to the use of his Will.*

ON a Bill for a specific Performance, the question was, Whether a Copyhold Estate belonging to *Nathaniel Middleton*, which had been surrendered to the use of his Will, passed by the same, or descended to his customary Heir? The Bequest was as follows: "In respect of worldly affairs, I cannot better manifest my love and attachment to my Family, than in nominating (which I hereby do) my dearly beloved and most amiable Wife, *Anne Frances Middleton*, the sole Executrix of this my Will, thereby bequeathing to her all the Property of whatever description or sort that I may die possessed of, to be by her appropriated in any manner she may think proper, for the maintenance of herself and such of my Children, whether natural or legitimate, as may be left without provision; for such of my Family as have happily settled in life, and are placed, if not in affluence at least above want, I know will pardon my excluding them from a participation in those scanty means, which it is my misfortune to leave for the subsistence of those who are left without any provision for subsistence."

The Will was without Date, Signature or Witnesses, but had been duly proved in the Ecclesiastical Court.

Mr. *Wetherell*, Mr. *Wingfield*, and Mr. *Pepys*, contended, the Copyhold Estate did not pass by the Will, and that the words of the Will applied only to the Testator's personal Estate—to such Property as ordinarily

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passes to an Executrix. The words “ thereby bequeathing,” &c. do not apply to the antecedent word “ Will,” but to the nomination of the Plaintiff’s Wife as Executrix, and to the Property which, as Executrix, she would take. If any thing more had been intended, the Testator would have used the word “ hereby bequeathing,” &c. instead of “ thereby,” &c. The Property bequeathed is directed to be appropriated, &c. by the Executrix,—words not usually applied to Copyhold Property, which it would be necessary to sell before the Produce could be appropriated. The Testator uses the words “ Property of whatsoever description I may die possessed of.” *Possessed*, applies only to personal Property. If there be any doubt upon the Will, the Heir must have the benefit of that doubt. He is entitled to whatever is not clearly given from him.

Mr. *Bell*, and Mr. *Sugden*, *contra*, were stopped by

The VICE-CHANCELLOR:—

If this Testator considered that the appointment of his Wife as Executrix, would amount to a gift of all his Property of every description, he was certainly mistaken. But his intention, that by virtue of that Instrument she should take all his Property of whatever description, is beyond all doubt, and the Wife will therefore take, by force of the intention, the Copyhold Estate in question, which will pass by an Instrument unattested. The criticism upon the words “ possessed ” and “ appropriated,” is too nice ; a Testator is not to be confined to the technical sense of the words which he uses.



1820.

BUTLER and another v. BORTON and others.

26th February.

*Testator by his Will gave to Trustees certain Real Estates, in trust, to M. for his life, with Remainders over, and his personal Estate, in trust, to B. for Life, and to her Children after her death; and directed "that the Timber or Wood which should be upon his real Estates should, from time to time, be used for the repairing the Houses thereupon, or otherwise for the benefit and advantage of his Estate; or that*

*the same should be sold, and the Money arising from the Sale thereof should be applied in the same way as his Personal Estate was directed to be applied." Held, that the Devise to M. carried the Underwood; and that the Trustees, leaving sufficient Timber on the Estate for Repairs, might cut down such Timber as was fit to be felled, or in a decaying condition, but not the Underwood.*

**WILLIAM MARSHALL** devised certain Estates of which he was seised in Fee, to the Plaintiffs, their Heirs and Assigns, upon Trust, out of the Rents, Issues and Profits, to pay certain Annuities, and subject thereto, in Trust for the Testator's Son, *Thomas Marshall*, for life, with Remainder to his Children as Tenants in common in Tail, with Cross Remainders in Tail, &c. and in default of Issue, Remainder over to the Testator's Brother, *Thomas Marshall*, for life, with Remainder to his youngest Son for life, with Remainder to his Children as Tenants in common in Tail, with Cross Remainders, with Remainder to the Testator's Sister, *Mary Borton*, for life, with Remainder to her Children as Tenants in common in Tail, with Cross Remainders, with Remainder to the Testator's right Heirs; and after giving several pecuniary and specific Legacies, he bequeathed all his personal Estate to the Plaintiffs, upon Trust to lay out the same in the Funds, &c. and pay the Dividends to the Testator's Son, *Thomas Marshall*, for life, and after his death to stand possessed of the Funds for his Children at twenty-one; but if he should have no Children, in Trust for the Testator's Sister, *Mary Borton*, for life, and after her decease to

stand possessed of the Stocks, Funds, &c. for her Children, with a Gift over if she had no Children; and the Testator directed that the Timber or Wood which should be upon his real Estates, or any of them, should from time to time be made use of for repairing the Houses thereupon, or otherwise for the benefit and advantage of his Estate, or that the same should be sold, and the Money arising from the Sale thereof, should be applied in the same way as his personal Estate was directed to be applied.

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 and others.

*Thomas Marshall*, the Son of the Testator, died in his life-time without issue; *Mary Borton*, the Testator's Sister, and her Husband, *Jonas Borton*, died also in his life-time, leaving nine Children, who survived the Testator and attained twenty-one; *Thomas Marshall*, the Testator's Brother, and Heir at Law, and his Son, *Thomas Marshall* the younger, survived the Testator.

*Thomas Marshall* the elder was let into Possession of the Estates; he died leaving his Son, *William Marshall*, his Heir at Law, and also the said *Thomas Marshall*, who entered into Possession of the Estates, and has Issue eight Children.

The Plaintiffs, shortly after the death of the Testator, caused the Timber then growing upon the Estates, which was fit to be felled, to be cut down and sold, and distributed the Monies arising by the Sale amongst the Children of *Mary Borton*, the Testator's Sister, and they claimed to be entitled to all the Timber and Underwood upon the Estates of the Testator, which had become fit to be felled since his death, and that the same ought to be sold for their benefit. On the other

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hand, *Thomas Marshall* the younger, and his Children, insisted that the Children of *Mary Borton* were only entitled to such Timber as the Plaintiffs had cut down, and to the Monies arising by the Sale of the same.— Under these circumstances, the Plaintiffs filed the present Bill, to ascertain the Rights of the Parties.

One of the Defendants, a Child of *Mary Borton*, was out of the Jurisdiction, but that was not proved. The *Vice-Chancellor* said, that as he was interested with the other Defendants in the Account, an Account might be directed during his absence, and that the deficiency of proof that he was out of the Jurisdiction, might be supplied by allowing an Interrogatory to be exhibited for that purpose; and as the Parties were desirous of having the points in the Cause now discussed, the point might now be argued.

Mr. *Blake*, and Mr. *Lynch*, for the Plaintiffs, the Trustees, submitted the question to the Court.

Mr. *Bell*, and Mr. *Sugden*, for the Children of Mrs. *Borton* :—

The Debts and Legacies are paid, and the only question is, as to the Timber and Wood directed to be sold. In the direction as to the Timber and Wood, the Testator does not consider merely the Repairs of the Houses on the Estates, but other purposes also, the Produce being to be applied in the same way as his personal Estates, viz. for the benefit of Mrs. *Borton* and her Children. The words “Timber and Wood,” are sufficiently large to pass the Underwood. The Underwood is so mixed with the Timber which is proper to be cut, that the Timber cannot be cut without the

Underwood; and the Testator must have intended it to be cut together, and the Produce applied for the purposes of the Will. If the Trustees are held not entitled to cut the Underwood, it would lead to great dispute, as the Timber cannot be cut without cutting the Underwood. They mentioned *Knight v. Duplessis* (a), and *Burgess v. Lamb* (b).

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Mr. Heald, and Mr. Boteler, for *Thomas Marshall* the younger, and his Children, were stopped by

The VICE-CHANCELLOR:—

The Devise of this Estate to *Thomas Marshall* for life, carried with it an immediate right to the Underwood, though not to other Wood. When the Devisor afterwards directs the Timber or Wood upon his Estates, to be used for repairing Houses, or otherwise for the benefit of his Estate, or that the same should be sold, he must be understood to mean the Timber or Wood to which the Tenant for life would not be entitled, and not the Underwood which was not capable of being applied to the repair of Houses.—Declare, therefore, that the Trustees are not entitled to cut Underwood, but that leaving sufficient Timber upon the Estate for Repairs, they are entitled to cut other Timber of proper growth, and not standing for shelter or ornament.

*Note.*—The Opinion of Lord Chancellor *Manners*, and of Lord Chief Baron *Richards*, when at the Bar, and also of the late Sir *Samuel Romilly*, were taken before the Case came into Court; and their Opinions were to the same effect as that expressed by the Vice-Chancellor.

(a) 2 Ves. 362.

(b) 16 Ves. 179.

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28th February.

HUSSEY v. HUSSEY.

*In the case of an Infant Tenant in Tail in Possession, the Court will authorize the cutting of all Timber which is fit to be felled; but where there is Tenant for Life impeachable of Waste, with Remainder over, the Court will only authorize the cutting of Timber where the interest of the succession requires it.*

THE Infant Plaintiff was Tenant in Tail in Possession of certain Estates under a Settlement, and he was Tenant in Fee in Remainder of certain other Estates under his Father's Will, subject to a Life Estate in his Mother, impeachable of Waste.

A Petition was presented on the part of the Infant, praying, that it might be referred to the *Master*, to inquire what Timber was fit and proper to be cut on both Estates.

The VICE-CHANCELLOR :—

As to the Estate of which the Plaintiff is Tenant in Tail in Possession, the Court will authorize the cutting of all Timber which is fit and proper to be felled, in a due course of management; but as to the devised Estate, the Court can only authorize the cutting of such Timber as is decaying, or which it is beneficial to cut, by reason that it injures the growth of other Trees. By making the Mother's Life Interest impeachable of Waste, the Devisor has declared, that no Timber shall be cut during the continuance of that Estate; or in other words, that the Timber shall be preserved for the benefit of the succession. And the Court, therefore, can only authorize the cutting of Timber where the interest of the succession requires it.

ROWE v. JARROLD and others.

1820.

THE Bill was filed on the 12th February 1820, and prayed an Injunction against Proceedings at Law.

29th February.

*Order for an Injunction obtained on a day to which the Seal was adjourned, the Plaintiff not being in a condition to move at the beginning of the Seal, set aside, with Costs.*

The Defendant was served with a *Subpœna* on the same day at 12 o'clock at night, and on the morning of Monday the 21st, the Plaintiff opened the Seal, and obtained an Attachment for want of Appearance, and on the same day, the Seal having been continued from the preceding Saturday, an Order was obtained for an Injunction to stay the Defendant's Proceedings at Law.

Mr. Agar, and Mr. Duckworth, moved, that the Order for the Injunction might be discharged, as the Plaintiff could not move on that day, to which the Seal had been adjourned, he not being in a condition to move on the preceding Saturday, when the Seal commenced.

Mr. Roupell, and Mr. Knight, contra.

The VICE-CHANCELLOR:—

An Injunction, except it be to stay Waste, can out of Term only be moved for on a Seal-day. Although Motions be continued on the following day, it is not a Seal-day, and no Injunction can then be moved for, which the Party was not prepared to move on the Seal d a (a).

Order for the Injunction discharged, with Costs.

(a) Vid. Maddock's Princ. & Pract. vol. ii. p. 213. 2d edit.

1820.

LANGLEY v. HAWK.

29th February.

*Executor and  
Trustee becoming  
a Bankrupt, a  
Receiver appointed,  
though the  
Testator knew,  
after he had  
made his Will,  
that a Com-  
mission had  
been issued.*

**MR. HEALD** moved for a Receiver, and that the Defendant, an Executor and Trustee, who had become Bankrupt, might pay into Court a Sum of Money acknowledged to be in his hands.

*Mr. Rose, contra,* stated, that Proceedings had been taken to supersede the Commission, which would probably be superseded, and that the Defendant had more than sufficient for the payment of his Debts; and that the Testator knew a Commission was issued against the Defendant.

*Mr. Heald,* in reply :—

The Will was made before the Commission issued.

The VICE-CHANCELLOR :—

The question simply is, Whether it is fit the Court should now interfere for the protection of this Property? Its interference can prejudice no right. I must consider Bankruptcy, notwithstanding the Petition to supersede, as Evidence of Insolvency; and from the Will being made long before the Commission, though not altered afterwards, I cannot satisfactorily infer, that this Testator had a deliberate intention to intrust the management of his Estate to an insolvent Executor. I think it fit that a Receiver should be appointed.

NICKOLSON v. KNOWLES and others.

1820.

1st March.

THE Plaintiff was employed as Broker to make Insurance of a Ship for one *Gilpin*. *Gilpin* became a Bankrupt, and his Assignees employed the Plaintiff to receive, as their Agent, a Sum due from the Underwriters for Salvage. Afterwards, the Defendant, *Knowles*, gave Notice to the Plaintiff that he was a secret Partner with *Gilpin*, and required him not to pay the Salvage to *Gilpin's* Assignees. The Plaintiff filed the present Bill, as a Bill of Interpleader, against the Assignees of *Gilpin* and *Knowles*.

*On a Bill of Interpleader, held, that an Agent to receive particular Monies, is bound to pay the same over to his Principal, notwithstanding the Claims of third Persons.*

Upon a Motion for an Injunction, the *Vice-Chancellor* held, that this was not a proper Bill of Interpleader. That the Plaintiff was an Agent authorized by the Assignees to demand and receive the Money for them; and having in that character demanded and received it, was bound to pay it to them, notwithstanding the Claims of a third person. That a mere Agent to receive for the use of another could not, by Notice, be converted into an implied Trustee. That his Possession was the Possession of his Principal.



1820.

## BAILEY v. VINCENT and others.

2d March.

*Bill filed against Bankrupts and their Assignees, questioning the validity of the Commission, and praying an Account; or if the Commission was legal, for leave to prove what should appear to be due under the Bankruptcy.*

*On a general Demurrer by the Bankrupt for want of Equity, the same was allowed; the proper mode of questioning the validity of a Commission being by Petition.*

THIS was a Bill filed against *Vincent, Fanner, Barnes* and *Hancock*, Bankers, and against their Assignees, and one *George Vincent*, for an Account, stating, that the Commission had been improperly issued, there being no act of Bankruptcy or petitioning Creditor's Debt, and that the Commission and act of Bankruptcy were concerted; and also stating the particulars of such concert, and that the Assignees had filed a Bill against the Plaintiff, charging him to be a Debtor to the Bankrupts Estate, whereas he was a Creditor.

The *Prayer* of the Bill was, for an Account against the Firm of *Vincent, Fanner & Co.*; or if it should appear there was a valid Commission against them, that the Plaintiff might be at liberty to prove what should be found due to him.

The Defendants, *Vincent, Fanner & Co.* who had been declared Bankrupts, demurred generally to the Bill, for want of Equity.

*Mr. Hart, Mr. Bell, Mr. Heald, and Mr. Pepys*, in support of the Bill:—

The Bankrupts are bound to answer this Bill. After the Bankruptcy, a Bankrupt may be examined as a Witness, because he has no Interest. If an Action is brought against a Bankrupt, and he pleads his Bankruptcy, the Plaintiff may reply that he is not a Bankrupt; if he

pleads his Bankruptcy and Certificate, the Plaintiff may reply, that the Certificate is void.

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v.

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and others.

If a Bankrupt has not obtained his Certificate, a Creditor may proceed against him here, or at Law. A Bill of Discovery may certainly be filed against a Bankrupt. In *Batson v. Lowndes* (a), it was held, that Bankrupts sued at Law might file a Bill for a Discovery, and Relief. On appeal, that Decision was confirmed.

Mr. *Horne*, and Mr. *Beames*, in support of the Demurrer, were stopped by

The VICE-CHANCELLOR:—

This is a Bill filed by the Executor of a deceased Partner, against his three surviving Partners, for an Account and payment of the Balance due to the Estate of the deceased Partner; and a Commission of Bankrupt having issued against the three surviving Partners, the Assignees under that Commission are joined as Parties Defendants; and it is alleged, that the Commission is concerted and void; but an alternative Prayer is introduced, that if the Commission is supported, then that the Plaintiff may prove under it for the Balance due to him.

To this Bill the Bankrupts have demurred generally; and the question is, Whether a Bill is the proper course for the Plaintiff to try the validity of the Commission?

This Plaintiff, like any other Creditor, may, if he pleases, present a Petition in Bankruptcy to supersede this Commission, and if he there establishes his case, the Commission will be removed, not only out

(a) *Ante*, vol. i. p. 423.

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of his way, but out of the way of all other persons who have an interest in the Bankrupts Estate. If, instead of raising the question by such a Petition, he is to be permitted to proceed in this Bill, not only will the validity of the Commission be tried, at great increased delay and expense, but the decision, whatever it may be, will affect only the Parties to the Suit. I believe such a Bill as this is quite new in Practice, and every principle of convenience being against it, I must allow the Demurrer.

## BURTON v. HAWORTH.

7th March.

*Infant Tenant in Tail, taking the benefit of the Insolvent Act (49 Geo. III. c. 115), his Estate Tail does not pass to his Assignees, because he could not be legally in custody for Debt.*

GENERAL BURTON was Tenant for life in Equity, with Remainder to the Plaintiff in Tail, with Remainders over. The Plaintiff during his infancy took the benefit of the Insolvent Act, passed in 1809 (a); afterwards, when of age, he suffered a Recovery, with the concurrence of the Tenant for life, to the use of General *Burton* for life, with Remainder to the Plaintiff in Fee. The Defendant purchased the Estate of the Tenant for life, and then contracted with the Plaintiff for his Remainder in Fee.

A Bill was filed by the Plaintiff for a specific performance of the Contract, and the Title was referred to *Master Campbell*, who reported a good Title could be made. The Defendant excepted to his Report, and the Exceptions came on now to be heard.

(a) 49 Geo. III. c. 115. See sections 14 & 49.

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Mr. *Shadwell*, in support of the Exceptions.

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Mr. *Coote*, *contra*, cited *Smith v. Cooke* (a).

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HAWORTH.

The *Vice-Chancellor* was strongly inclined to the Opinion, that an Infant was not within the 49th Section of the Act, because he could not defeat his Estate by Fine or Recovery, but decided in favour of the Title, upon the ground, that an Infant could not be an Insolvent Debtor, within the provisions of the Act, because he could not legally be in custody for Debt.

Exceptions overruled.

(a) 3 Atk. 381.

BEAUMONT and others v. BEAUMONT and others.

7th March.

THE Bill was filed by the Legatees for the payment of Legacies bequeathed to them by the Will of one *Beaumont*, and it *prayed* an admission of Assets, or the usual Accounts in the common form, thus: " And that the said D<sup>e</sup>fendants may either admit personal Assets of the said Testator in their hands sufficient for payment of his the said Testator's funeral and testamentary Expenses, just Debts, and the Legacies given by his said Will, or may set forth a full true and particular Account of all the personal Estates and Effects, which the said Testator was at the time of his death possessed of, entitled to, and beneficially interested in, together with the particular names, kinds, qualities, quantities, full

*In Answer to the usual Interrogatories in a Bill against an Executor, as to the Particulars of personal Estate, and for what it sold, a Schedule annexed to the Answer, in which every particular article of personal Estate was set forth, and what it sold for,*

*was, on Exceptions, held impertinent; it being only necessary to state the whole amount for which it sold.*

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true and utmost value thereof, and of every part thereof, and of the full true and utmost value and amount thereof, in the whole; distinguishing what parts thereof, and to or for what amount or value in the whole, have been possessed, got in, and received by them the said Defendants, or either and which of them, or by their or either and which of their order, or for their or either and which of their use; and whether any and what part or parts of the said Testator's personal Estate or Effects have or hath been sold by them the said Defendants, or either and which of them, or by or under their or either and which of their Order or Authority, and when, to whom, in what manner, or for what sum or sums of Money, and for how much in the whole." The Defendants, the Executors, having sold the Testator's Household Furniture by Auction, they set forth in the Schedule to their Answer a Copy of the Auctioneer's Catalogue, with the description and price of every article. The Plaintiffs referred the Schedule for impertinence; but the *Master* reported the Schedule not to be impertinent. The Plaintiffs excepted to his Report, and the Exception now came on to be argued.

Mr. *Barber*, for the Exception.

Mr. *Cooper*, *contra*, cited *Norway v. Rowe* (a).

The VICE-CHANCELLOR:—

This Bill contains only the common Interrogatory, and it involves, therefore, a general question of some importance in point of Expense. I think it would be highly inconvenient, to hold that, in answer to the com-

(a) 1 Meriv. 347.

mon Interrogatories, a Defendant is justified in loading the Parties with the Expense that attends the setting forth all the minute particulars and prices in an Auctioneer's Catalogue. The Defendant might have satisfied himself by stating, that the Household Furniture was sold by Auction at such a time and place, and by such a Person, and produced such a Sum. If a Plaintiff really desires to be furnished with these minuter details, he will have no difficulty in explaining his purpose by a special Interrogatory.

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BROWN v. BELLARIS,

8th March.

A FATHER, who was a Trader, laid out a sum of 5,000*l.* in the purchase of Stock, in the names of his Son, a minor, and of a Trustee for him. The Father afterwards became a Bankrupt; and the question was, Whether this Stock was within the provisions of the 1 Jac. I. c. 15. s. 5?

*Stock purchased by a Father, afterwards a Bankrupt, in the Names of his Son, a Minor, and a Trustee, is within the provisions of the 1 Jac. I. c. 15, s. 5.*

The VICE-CHANCELLOR:—

Goods and Chattels comprise Stock. In their legal signification they embrace all personal Estate, although the context of a particular Instrument may give them a qualified sense. The Case is plainly within the mischief.

WHATTON v. TOONE.

WHATTON v. WHATTON.

WHATTON v. BOND.

1820.

10th March.

*An Executor purchasing assets belonging to the Estate of his Testator, with the assent of the Parties then interested, will not, after a length of time, be answerable for the Profit he has made; but he will, when he has purchased with a fraudulent intention.*

**T**HE Plaintiff was Tenant in Tail in Remainder after the death of the Defendant, his Mother, of Lands to be purchased with the residue of his Grandfather's Estate. His Father and Mother had, a few years after the Grandfather's death, instituted a Suit, to which the Plaintiff, then an Infant, was a Party Defendant, against the Executors, for an Account of the Grandfather's Estate. The acting Executor, Mr. Toone, the Testator of the Defendant Toone, upon his Examination in that Suit, represented, that wanting a Sum of Money to pay a particular Debt of the Grandfather's, he had, at a particular time stated, sold certain Canal Shares, part of the Grandfather's Assets, at Sums there mentioned, with which he debited himself. It appeared in Evidence in this Cause, that the Debt in question had not been paid for a year after the Sale of the Canal Shares, and that the Canal Shares had been transferred by the Executor, Mr. Toone, to two Persons, who, at the end of a year, had declared themselves to be Trustees for him; that Mr. Toone, the Executor, was the Clerk and Treasurer of the Canal Companies, and that the Canal Shares were, at the time of the alleged Sale, increasing in value. The Plaintiff came of age in 1803, and filed his Bill in 1806. The alleged Sale took place about 1790, and the Examination of the Executor, Mr. Toone, was in 1796: he died in 1805. There was Evidence, that the Father

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of the Plaintiff, who was dead, was at the time acquainted with the real transaction, and it was therefore insisted for the Defendant, *Toone*, that there was no intention of Fraud, and that the Court, under such circumstances, would not relieve against a Purchase by the Executor, after such a length of time.

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### The VICE-CHANCELLOR:—

If an Executor, ignorant of the Rules of this Court, openly purchase Assets of his Testator, with the full approbation of the Parties then presently interested, the Court would not in that case press the equitable Rule (a) against him after such a length of time. But in this Case, the transaction was concealed and disguised in a manner which imported fraudulent intention; and admitting the Father to be acquainted with the real Transaction, his conduct cannot conclude either the Mother or the Son. The Shares, which contained part of Mr. *Toone's* Estate, must be sold, and the Dividends, from the death of the Father, must be accounted for, giving credit for the Price paid, and Interest.

(a) See this rule as to of Trust property, and the Purchases by Trustees and Cases, 1 Mad. Prin. and Pract. others in fiduciary situations 110, &c. ed. 2.



1820.

## GLADDING v. YAPP.

15th March.

*A direction in a Will "to keep Accounts," held to afford a presumption that the Executrix was not meant to take beneficially; but parol Evidence was admitted on behalf of the Executrix, to show that she was intended to take the residue for her own benefit; and such Evidence being satisfactory, the Bill by the next of kin was dismissed.*

*JOHN MONK*, by his Will, 15th March 1815, gave to his Kinsman *Thomas Harris*, all his Messuage and Tenement, Garden and Orchards thereunto adjoining, with the Possession of the Lands he then rented; and also all his Household Furniture, Stock, and Implements of Husbandry, "except one Mare, which I except for the use of Sister *Catherine Yapp*; and the said *Thomas Harris* is truly to enjoy the same after my decease, without interruption: the Messuage, Tenement and Lands I give to him and His Heirs for ever; but my Sister *Catherine Yapp* is to and shall have her free living in the House, or any part for her use, as long as she lives, with the use of any Household Furniture she likes, without any interruption:" and after various other Bequests, the Testator concluded his Will thus: "Now I constitute and appoint my Sister *Catherine Yapp* to be my sole Executrix, and *James Parlour* shall have power jointly to call up any Monies due upon Bonds, Notes or any other Securities, to discharge my Funeral Expences and Debts and Legacies, as soon as they shall think meet after my decease, keeping a proper account of the same: and I give unto *James Parlour*, my Trustee, the sum of 50*l.* for his trouble, to be paid out of my Monies that are due to me at my decease."

The Will was proved by *Catherine Yapp*. The personal Estate, after payment of all the Debts, Legacies and Funeral Expenses, was very considerable; and the

Plaintiffs, as the next of kin, claimed the same as being undisposed of by the Will.

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GLADDING

v.

YAPP.

The Defendant, *Catherine Yapp*, on the 12th June 1817, demurred to the Bill for want of Equity; but the Demurrer was overruled by the *Vice-Chancellor*, on the 16th January 1818, upon the ground that the direction to keep Accounts *primâ facie* imported a Trust.

Afterwards, *Catherine Yapp* died, and a Bill of Revivor and Supplement was filed against her Executor, *Richard Yapp*, who submitted, by his Answer, that *Catherine Yapp* was entitled to the clear Residue of the Testator's personal Estate, for her own benefit, and that he was entitled to the same as her Executor, and that the Suit and Proceedings ought not to be revived against him; and that he should be able to prove that the Testator intended to give, and thought he had given, the clear Residue of his personal Estate to *Catherine Yapp*.

Evidence was entered into by the Defendant; and *James Parlour* (mentioned in the Testator's Will, and who drew the same) deposed, "that four days before he made his Will, the Testator informed him of the disposition he meant to make by his Will," and that he should give the remainder or overplus of his Property, after payment of the Legacies, to his Sister *Catherine Yapp*, and that he would make or appoint her his Executor (a)." He also swore, that "some days after he wrote out the Testator's Will, and by his directions made some alterations; and upon being asked

(a) The word Executor was used in the Deposition.

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what he meant to give the *Yapps*, (meaning *Catherine Yapp*, the Executrix's two Sons,) he said, " he should or would not leave them any thing, as he should appoint *Kate*, (meaning their Mother,) his Executor, and she might do what she would with it." He swore, also, that the Testator said, " that the Deponent would have a good deal of trouble, as his, the Testator's Sister, was no Scholar, and only a Woman, and that the Deponent was to keep the Account of the Property for her."

Mr. *Bell*, and Mr. *Pepys*, for the Plaintiffs :—

It was held, on the Demurrer, that *Catherine Yapp* was not entitled on the face of the Will; the Court inferring, from the direction in the Will, " to keep a proper Account," that she was not meant to take beneficially. The Defendant, the Executor of *Catherine Yapp*, who died after the Demurrer was overruled, has now, on the Bill of Revivor and Supplement, entered into parol Evidence with a view of showing that the Testator intended *Catherine Yapp* to take the Residue beneficially, and the Evidence is favourable to his Claim, if such Evidence be admissible. Here it is clear, on the face of the Will, that a Trust was intended; and in *Langham v. Sandford* (b), Lord *Eldon* says, that when there is a clear intent on the face of the Will, that the Executor was meant to take only as a Trustee, parol Evidence is inadmissible on the part of the Executor.

The VICE-CHANCELLOR [stopping the Defendant's Counsel]:—

Parol Evidence is not admissible to contradict a

(b) 2 Meriv. 16.

Will; and if the Will contain express declarations that the Executor is to be a Trustee, Evidence cannot be received against the effect of that declaration; but if there be no express declaration of Trust in the Will, and only circumstances which afford inference or presumption of Trust in the Executor, there parol Evidence is admissible to answer that inference or presumption (c).

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Here the Testator has appointed his Sister, *Catherine Yapp*, sole Executrix, and *Parlour* his Trustee, and he directs that she and *Parlour* shall have power jointly to call up all monies due upon Bonds, Notes or any other Securities, to discharge his Funeral Expenses, Debts and Legacies, as soon as they shall think meet after his decease, keeping a proper Account of the same. It appeared to me, on the Argument of the Demurrer, that these words afforded an inference or presumption that she was not to take the Residue beneficially, for otherwise, no Account on her part was necessary; but the Evidence explains this passage in the Will. It appears by the Testimony of *Parlour*, that four days before the Will was made, the Testator told him that he meant to give the overplus of his Property, after payment of the Legacies, to his Sister, and to make her Executor; and in a Conversation, when the Will was making, he said he would not give *Catherine Yapp's* sons any thing, as he would appoint *Kate* (meaning *Catherine Yapp*) as his Executor, and she might do what she would with it. The Witness further states, that when he was writing the Will, wherein the Wit-

(c) See the Cases collected, 2 Madd. Prin. & Pract. 105, 106, 2d edit

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ness was appointed a Trustee, the Testator said, "that as his Sister was no Scholar, and only a Woman, that he, *Parlour*, was to keep the Accounts of the Property for her." The inference or presumption, therefore, from the direction to keep Accounts in the Will, is explained; and it now appears there was no reason for the Testator naming *Parlour* as a Trustee only, and his Sister Executrix, as they were to have the same powers, but because he meant the latter to take the Residue beneficially. The Bill must be dismissed.

18th March.

REYNOLDS v. NELSON.

*Notice was given of a Motion to dismiss. On the same day the Motion to dismiss was made, a Replication was filed. Held that the Bill did not stand dismissed, and that the Defendant was not entitled to the Costs of the Motion.*

ON the 19th February the Defendant moved to dismiss the Bill for want of Prosecution. On the same day a Replication was filed. On applying, on the 22d, for a Certificate of no Proceedings having been had in the Cause, to enable the Defendant to draw up the Order, it was refused, the Replication having been filed on the day the Motion was made.

It was now moved, by Mr. *Maddock*, that the Order of the 19th of February might be directed to be drawn up, upon a Certificate of the Clerk in Court, that the Replication was filed on that day. It did not appear, whether it was filed before the Motion was made; and it was urged, there ought to be an Affidavit of the fact, and that at least the Costs of that Motion should be paid, as the Replication was filed after Notice of the Motion to dismiss; and *Spurrier v. Bennett (a)* was

(d) *Ante*, vol. iv. p. 39.

cited. On the other hand, Mr. *Wakefield* insisted, that as a Replication was filed on the same day when the Motion to dismiss was made, that was sufficient; and that the Defendant was not entitled to the Costs of the Motion to dismiss.

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The VICE-CHANCELLOR:—

It is sufficient that the Replication was filed on the day the Motion was made; and whether it was filed after the Motion to dismiss, or before it, is immaterial, as there can be no fraction of a day.

In the Case cited, the Motion was not of course, as it was in this Case; and there is, therefore, no title to the Costs of the Motion to dismiss.

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JAMES BUTCHER, and SARAH, his Wife,  
Plaintiffs;

and

EDWARD KEMP, JAMES BATTS, and ELIZABETH BUTLER, Spinster - - - Defendants.

12th April.

*THOMAS BUTLER*, by his Will, 8th February 1815, devised to the Defendants *Edward Kemp* and *James Batts*, a Farm, containing about 136 Acres, to hold to them and their Heirs, during the minority of his Daughter, the Defendant, *Elizabeth Butler*. Upon

*The Testator directs his Trustees to continue his farming Business on his Farm of 136*

*Acres, during the Minority of his Daughter, and for her benefit. The Widow, a Devisee, is put to her election in respect of her Dower out of this Farm, because the Testator's intention was that the Trustees should be possessed of the entire Farm, and her Title to Dower would disappoint that intention.*

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his Daughter attaining twenty-one, he devised the said Farm unto her and her Assigns for life, without impeachment of Waste, other than destructive or malicious Waste, with Remainder to his said Trustees to preserve contingent Remainders, &c. with Remainder, after the decease of his Daughter, to the use of the first and other Sons, &c. of his Daughter in tail male, with Remainder to the Daughters of his said Daughter, with Cross Remainders, with Remainder in default of such Issue of his Daughter, or in case of her death under twenty-one, without Issue, to the Plaintiff, his Wife, and her Assigns for life, with Remainder to the Trustees, in trust to sell and dispose of the said Farm; and the Testator declared that his Trustees should stand possessed of the said Farm during the minority of his Daughter, upon trust, to carry on the Business thereof, or to let the same upon Lease, for her benefit, as to them or the Survivor should seem best, with a proviso that it should be lawful for his Daughter, and her Issue, and he thereby empowered her and them, when and as they should respectively attain twenty-one, and be entitled in possession, and likewise for his Trustees or the Survivor, and the Heirs of such Survivor, and his Assigns, during the minority of his Daughter or her Issue, who for the time being should be entitled, to demise, lease or grant, or limit or appoint by way of demise, lease or grant, the said Farm, or any part thereof, in the manner in the Will mentioned; and the Testator further declared, that the Trustees, &c. should stand possessed of the Money to arise by sale of the Farm, in the event of the same being sold, for such Person as at the time of the death of the Testator's Daughter, without Issue, should be his next of kin, as if he had died intestate and unmarried. The Testator

then devised eighteen Acres of Land, part whereof was Copyhold, and had been surrendered to the use of his Will, to his Wife, the Plaintiff, *Sarah Butcher* (formerly *Butler*) and her Assigns, for her life, and after her death to his said Daughter, her Heirs and Assigns for ever; and also gave several specific and pecuniary Legacies to his said Wife. The Testator died 16th January 1815, leaving the Defendant, *Elizabeth Butler*, his Daughter and only Child and Heir at Law, and his Widow, now the Wife of the Plaintiff *James Butcher*; and upon his death, the Defendants the Trustees entered into possession of the Testator's Estates.

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and Wife  
v.  
KEMP  
and others.

The Plaintiff and his Wife filed a Bill, insisting that the Plaintiff, *Sarah Butcher*, the late Wife of the Testator, was entitled to Dower out of all the real Estates of which the Testator died seised, with the usual Prayer in such cases.

The question in the Cause, was, Whether the Widow was dowable out of the Farm of 136 Acres?

Mr. *Garratt*, for Plaintiffs.

Mr. —, for Defendants (a).

The VICE-CHANCELLOR:—

The question is, whether the Widow is entitled to Dower out of the Farm and Premises given to the Trustees during the minority of the Daughter? If there be other real Estate, besides the Farm in question, it is not alleged that there is any thing in this Will to deprive the Widow of Dower in such other real Estate. The Widow is entitled to Dower out of this Farm, unless the Husband has in his Will made some Gift of it necessarily inconsistent with her Claim of Dower in that Farm, and which would be disappointed by it.

(a) I was not present at the Argument.



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and Wife

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and others.

The Testator directs that his Trustees shall stand possessed of this Farm, which he describes as containing about 136 Acres, during the minority of his Daughter, upon Trust to carry on the Business thereof, or to let the same upon Lease, for her benefit, as they should think best; and for that purpose, gives them all his Stock, Cattle and Implements upon the Farm. The question is, Whether the Testator can be considered as speaking here of his Interest in the Farm subject to his Widow's Claim of Dower? His plain intention, is, that his Trustees should, for the benefit of his Daughter, have authority to continue his Business in the entire Farm which he himself occupied, consisting of about 136 Acres; and this intention must be disappointed, if the Widow could have assigned to her a third part of this Land. This Case is within the principle of *Miall v. Brain* (a), which was lately before me, in which I held the Claim of Dower necessarily excluded by the Gift of a House for the personal occupation and enjoyment of the Testator's Daughter.

(a) *Ante*, vol. iv. p. 119.

3d May.

BARKER v. RAY.

*Plea overruled,  
there being Relief  
prayed, which the  
Plea did not  
cover.*

**B**ILL filed by Plaintiff, claiming under a Will alleged to be suppressed, (stating circumstances from which the existence of the Will was to be presumed,) against the Heir at Law of the Testator, *praying* an Account of the Rents and Profits, and a delivery of the Possession and Title Deeds; or if the Court should be of opinion, that Plaintiff was not entitled to that Relief, then that the Defendant might be decreed to deliver up the Will, and might be restrained from setting up any outstanding Terms.

The Bill charged, that there were outstanding Terms.

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The Defendants pleaded there were no outstanding Terms.

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Mr. *Heald*, and Mr. *Bickersteth*, in support of the Bill :—

The question is, Whether the plea covers the whole Bill. If, according to the Case made by the Bill, the Plaintiff had no title to the assistance of a Court of Equity, except for the purpose of an Injunction to restrain the setting up of outstanding Terms, then the plea that there are no outstanding Terms, would cover the whole Bill. But here the Plaintiff alleges that the Defendants are in possession of the Will upon which his Title depends, and prays a delivery of that Will; and he is entitled to the assistance of a Court of Equity for the production of the Will, in order to support his Case at Law.

Mr. *Trower*, Mr. *Bell*, Mr. *Wetherell*, and Mr. *Rose*, in support of the Plea :—

A Plea to Relief is a Plea to Discovery. The delivery of the Will was prayed here only as incidental to the Discovery, and it is plain the Plaintiff has so considered it, as he has not annexed the Affidavit usual in Cases of a lost Instrument.

The VICE-CHANCELLOR :—

In considering this Plea, I cannot take notice whether there be or not an Affidavit that the Plaintiff has not the Will in his possession; nor is it necessary to decide whether, strictly speaking, the production

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of an Instrument is relief, or discovery. The Plaintiff, according to the Case made by the Bill, has a right to the aid of a Court of Equity for the production of this Will, to support his Title at Law ; and the Plea leaves this part of the Case untouched.

Overrule the Plea.

BOTT and another v. BIRCH.

15th May.

*After the examination of a Witness on the part of the Plaintiff, a written Paper, signed by him and the Defendant, was produced to him, inconsistent with what he had sworn ; a Motion on the part of the Plaintiff to re-examine the Witness, and for a production of the written Paper on his re-examination, refused.*

*WILLIAM LUCAS*, by his Affidavit, stated, that he was examined as a Witness in this Cause, on the part of the Plaintiff, and that subsequent to his examination, the Clerk of the Agent to the Defendant's Attorney called upon the Witness, and produced a Copy of a Paper Writing which purported to bear the signature of the Witness, and of the Defendant *Birch*, witnessed by one *Joseph Smith* ; and such Clerk intimated an intention of examining *William Lucas* as to the same on the part of the Defendant :—That afterwards, the same Clerk and the Defendant called upon *William Lucas*, and produced the original Paper Writing :—That at the time the Deponent was examined on the part of the Plaintiff, it was not in the Deponent's recollection that he had ever signed any such Paper as was afterwards produced to the Deponent by the Defendant *Birch* ; and he believes it is essential to the justice of the Cause, that the Deponent should be examined touching the said Paper Writing, and should have an opportunity of giving his Testimony of what took place previously and subsequently to the time of the same being signed, and that without such

opportunity, Deponent is apprehensive, and verily believes, that his Deposition already made in this Cause will appear inconsistent with the contents of the said Paper Writing:—That in consequence of the intention intimated to Deponent, of examining him on the part of the Defendant, touching the said Paper Writing, Deponent held himself in readiness to attend the Examiner, on receiving Notice from the said Agents of the said *Thomas Birch* for that purpose, till about the middle of April last, at or about which time this Deponent wrote to the said Agents of the said *Thomas Birch*, informing them that Deponent had occasion to leave *London* for a short time (which was the truth), and desiring to know when it was intended that Deponent should be examined; in answer to which application, Deponent received from the Agents of the said *Thomas Birch* a Letter, which he hath since lost or mislaid, informing him that it would not be necessary to Examine Deponent for the present, though Deponent is not now able to state the exact expression of the said Letter:—That he is induced by the said Letter to believe, and does verily believe, that it is not intended to examine Deponent on the part of the Defendant to the said Agreement:—That he hath been informed by the Plaintiff's Solicitors, and he believes it to be true, that *Joseph Smith*, of, &c. Farming Servant, has been examined in this Cause as a Witness on the part of the Defendant, and he verily believes the said *Joseph Smith*, so stated to have been examined, is the same Person whose name stands as the attesting Witness to the signing of the Paper Writing hereinbefore mentioned.

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and another  
v.  
Birch.

By an Affidavit of *John James*, Clerk to the Solicitor

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BIRCH.

for the Plaintiffs, it was sworn, that a Paper Writing, annexed to his Affidavit, was served on such Solicitor, notifying to them on the part of the Defendant, that *Joseph Smith* was under examination on the part of the Defendant; and the Deponent further stated, that publication had not passed in the Cause.

Mr. *Benyon*, and Mr. *Barber*, now moved on behalf of the Plaintiffs, that they might be at liberty to re-examine the Witness *William Lucas*, who had been already examined on the part of the Plaintiff; and for that purpose to exhibit before the Examiner, one or more further additional Interrogatory or Interrogatories, as they should be advised; and that the Defendant might be ordered to leave with the Examiner a certain Paper Writing or Memorandum, now in the possession, custody or power of the said Defendant, or his Solicitor, bearing the Signatures of the said *William Lucas*, and of the said Defendant, and appearing to be witnessed by one *Joseph Smith*. In support of the Motion, they cited *Kirk v. Kirk (a)*, and observed, that the Paper Writing was not in issue in the Cause.

Mr. *Wetherell* opposed the Motion, and cited Lord *Abergavenny v. Powell (b)*.

The VICE-CHANCELLOR :—

This Witness having been examined on the part of the Plaintiff, has since seen a written Paper, signed by himself, which is in the possession of the Defendant, and which he admits is at variance with his Testimony. He now desires to be re-examined, in order to correct

(a) 13 Ves. 288.

(b) 1 Meriv. 130.

his former Evidence. A Re-examination in such a case would be too dangerous to Justice, and cannot be permitted.

Motion refused.

1810.

Borr  
and another  
v.  
BIRCH.

MICHELL v. MICHELL and others.

15th May.

**JOHN MICHELL**, by his Will, 9th January 1810, after devising a Messuage and Premises to his Daughters *Elizabeth* and *Mary Michell*, two of the Defendants, and to their Heirs, &c. as Tenants in common; and also a Garden, Orchard and Premises; and all and singular his Plate, Linen, China, Household Goods, and (a) Furniture and Effects that he should die possessed of, devised unto his two Sons *Richard* and *Edward Michell*, the two other Defendants, all his Estate called *Holsome*, and all other his Messuages or Tenements, Lands, Hereditaments, real Estate and Estates whatsoever," upon Trust, that they or the Survivor, his Heirs &c. should sell the same; and out of the Monies to arise from the Sale, to pay his Funeral Expenses, and the Costs of proving his Will; and in the next place to retain all sum and sums of Money then due, or thereafter to grow due from him to them respectively, on Mortgage, Bond or Memorandum, and the Interest thereof respectively; and should also pay all such other Debt and Debts, of what nature or kind

*Bequest to E. and M. "of all and singular his Plate, linen, China, Household Goods and Furniture and Effects that he should die possessed of;" and a Devise in trust of a real Estate, and out of the Monies to arise from the Sale thereof, to pay Funeral Expenses, Money due on Mortgage, and all other Debts, and the residue amongst the Testator's Children.*

*Held, that the word "effects," coupled with the context, operated as a specific Bequest of the personal Estate, and that the same was not liable to the payment of Debts.*

(a) In the Brief, the word omitted, but it appeared in "and," in this place, was the Probate of the Will.

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and others.

soever, as should be due from him to any other Person or Persons at the time of his decease, and divide the residue of the Trust Monies between his five Children; viz. the Plaintiff, *Richard* and *Edward Michell*, and *Elizabeth* and *Mary Michell*, their Executors, &c. to be equally divided between them, the same to be vested interests in such Children, at his death; and he further directed, until such Sale as aforesaid, the Rents should be paid to such Persons, and in the same proportions as the proceeds of the Sale were applicable.

By a Codicil, 19th January 1810, the Testator, after reciting the Bequests to his two Daughters, directed that if either of them should die in his life-time, the share of such Daughter should devolve on her surviving Sister. The Testator died 7th December 1811, leaving the Plaintiff, his eldest Son and Heir at Law, and the said *Richard* and *Edward Michell*, *Elizabeth* and *Mary Michell*, Survivors; and *Richard* and *Edward Michell* proved his Will and Codicil, and entered into possession of the Testator's real and personal Estate.

The Bill stating these facts, *prayed*, as against *Richard* and *Edward Michell*, the usual Accounts of the Testator's personal Estate and Effects, not specifically bequeathed; and also an Account of the Testator's real Estates devised to them in Trust; and that the Trusts might be performed, and that the Testator's personal Estate, not specifically bequeathed, might be applied in payment of his Funeral Expenses and Debts; and that the real Estates, devised in Trust, might be sold; and if the personal Estate, not specifically bequeathed, should not be sufficient to pay the Funeral Expenses and Debts, that a competent part of the Monies to be

produced by sale of the Trust Estates might be applied in payment of the same; and that one fifth of the whole of the Monies to be produced by the Sale of the Trust Estates, in case the Testator's personal Estate, not specifically bequeathed, should be sufficient to pay his Funeral Expenses and Debts, might be paid to the Plaintiff; but in case the same should not be sufficient, then one fifth part of the residue only, after the payment of such Funeral Expenses and Legacies; and for a receiver.

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MICHELL  
v.  
MICHELL.  
and others.

The first question was, Whether the word "Effects," used in the Bequests to the Testator's two Daughters, passed the whole of his personal Estate, or whether only such Property as was *ejusdem generis* with the Property expressed before the word "Effects;" viz. "Plate, Linen, China, Household Goods and Furniture?" And the second question was, Whether, if the word "Effects" passed the personal Estate to the Daughters, they did or not take it exempt from Debts?

Mr. Heald, and Mr. Hinds, for Plaintiff.

Mr. Bell, and Mr. Ray, for Defendants Richard and Edward Michell; Mr. Palmer for the Defendants Elizabeth and Mary Michell, cited *Campbell v. Prescott* (b).

I was not present during the Argument.

The VICE-CHANCELLOR:—

The word "Effects," used *simpliciter*, will carry the whole personal Estate, as a gift "of all my effects,"

(b) 15 Ves. 500.



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v.

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and others.

without more. But it is frequently used in a restricted sense, meaning "Goods and Moveables," as in the common expression of "Furniture and Effects." In every Case the Court has to collect from the context the particular sense in which the Testator has intended to use it. In *Campbell v. Prescott* there were added to the word "Effects," "of what nature and kind soever;" and this addition excluded its restricted sense. And it appears to me, that the words which follow "Effects," in the present case, "that he shall die possessed of," lead to the same conclusion. It is further to be observed, that the words here are not "Household Goods, Furniture, and Effects," but "Household Goods and Furniture, and Effects," which imports a distinct sense in the word "Effects," particularly with the addition of the words "that he shall die possessed of;" and further, unless this Testator intended to describe his general personal Estate by the word "Effects," he has omitted all notice of it in his Will. I think, therefore, the best construction here is, that this Testator meant to give to his Daughters all the Effects which he should die possessed of, or in other words, all his personal Estate.

With respect to the second question, the Case of *Greene v. Greene*(c) is precisely in point. I had occasion there to consider all the Cases upon the subject fully, and I must say here, as I said there, that this Testator meant his real Estate should be the primary, and not the auxiliary, Fund, for the payment of his Funeral Expenses and Debts.

(c) *Ante*, vol. iv. p. 148.

FAIRCLOTH v. WEBB and others.

(*By Original and Supplemental Bill*)

1820.

15th May.

IN the Original Bill, the Defendant *Segrave Faircloth*, the Infant, put in his Answer, by Guardian, and in such Answer, and also in the Original Bill, his Christian Name was correctly spelt "*Segrave*." In the Supplemental Bill, and in the Order made in the Supplemental Suit to take his Answer by Guardian, without Oath, his Christian Name was spelt in the same manner; but in his Answer to the Supplemental Bill, and in the Assignment of his Guardian for the purpose of an Answer thereto, the Christian Name was spelt "*Seagrave*," and on account of this variance in the spelling of the Name, the *Six Clerk* refused to file the Infant's Answer.

Mr. *Barber* moved, that the *Six Clerk* might be directed to file the Answer of the Defendant, *Segrave Faircloth* the Infant, to the Supplemental Bill, notwithstanding the variance in the mode of spelling the Christian Name; and *His Honor* made such Order.

1820.

18th and 30th

May.

*A Submission to an Award may be made a Rule of Court after the Award is made.*

SMITH v. SYMES.

MR. PEPYS moved to make a Submission to an Award a Rule of Court, observing, that he believed it was a Motion of course, but that Notice had been given of the Motion.

Mr. Wakefield, *contra*, objected, that as the Award had been made, it was too late to move to make it a Rule of Court, and that the Motion should have been made previous to the Award; he cited *Spettigue v. Carpenter* (a). In addition, he observed there was another objection, *viz.* that a Bill had been filed to impeach the Award, to which a Plea had been put in and overruled, with leave to amend it; and observed, that in *Coles v. Brooken*, in the Exchequer, about three years ago, where a Bill was filed to impeach an Award, and to restrain the Defendant from making the Submission a Rule of Court, the Court enjoined the Defendant from making it a Rule of Court.

Mr. Pepys, in reply :—

There is a general understanding, that the Submission to an Award may be made a Rule of Court at any time previous to, or after, the Award is made. In common Practice, the application is usually after the Award, and by the Person in whose favour it is made. In *Pownall v. King* (b), the objection was overruled, though *Spettigue v. Carpenter* was insisted on. *Alardes v. Campbel* (c), and *Chicote v. Lequesne* (d), were cited by the Lord Chancellor as Authorities in support of his Opinion.

(a) 3 P. Wms. 361.

(b) 6 Ves. 10.

(c) 1 Barn. 152.

(d) 2 Ves. 315.

The VICE-CHANCELLOR :—

The Cases of *Pownall v. King*, and *Fetherstone v. Cooper* (e), both before Lord *Eldon*, have concluded the point, that the Submission may be made a Rule of Court after the Award. As to the other point, the mere filing of a Bill to impeach an Award can be no reason why the other Party should not make the Submission a Rule of Court. When he seeks the authority of the Court to enforce the Award, then will be the time to consider the effect of the Bill filed to impeach the Award.

1820.

SMITH  
v.  
SYMES.

Motion granted.

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FRANCIS v. COLLIER.

MR. PHILLIMORE moved on behalf of the Defendant, that A. B. who had received some Monies on behalf of the Plaintiff, before the institution of the Suit, but who was not a Party to the same, might be at liberty to pay the Money into Court, in Trust in the Cause. A Receiver had been appointed, but he refused to receive the Money, as he had no authority for that purpose.

30th May.

Order made  
that A. B. a  
stranger to the  
Suit, might be at  
liberty to pay  
Money into  
Court.

The VICE-CHANCELLOR :—

I have no authority to make a compulsory Order upon any person not a Party to the Suit; but I see no objection to an Order that this Person may be at liberty to pay the Money into Court.

Order made.

(e) 9 Ves. 67.

*Ex parte ENDERBY in re PASMORE.*1820.

1st June.

THIS was a Petition to stay a Bankrupt's Certificate, by a Creditor who had not proved, alleging, upon information and belief, that the Bankrupt had been engaged in Stock-jobbing Transactions, and had acknowledged to a Person named, that he had lost a particular Sum. The Petition was supported by an Affidavit. The Bankrupt, by his Affidavit in answer, denied the Loss charged, but did not deny that he had made the acknowledgment stated. The *Vice-Chancellor* observed, that the objection to the Certificate being one which the Petitioner might try at Law, the Court would not stay the Certificate where the Facts were left in doubt; and that such was the case here; but as the Bankrupt had not denied the acknowledgment of Loss, he refused to dismiss the Petition with Costs, stating that such an acknowledgment justified the Petition.

Petition dismissed, but without Costs.

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ANON.

2d June.

THE *Vice-Chancellor* held, that where an Assignee is removed for the convenience of the Estate, as in case of infirmity, he does not pay the Costs, as he does where he retires for his own convenience.

1820.

1st June.

WRIGHT and another v. NAYLOR and another.

THE Father of the Infant Plaintiff left to the Defendants some small Property, about 500*l.* in Trust for the Maintenance of the Infant until twenty-one, and then to pay him the Principal; and the Defendants were also appointed Guardians of the Infant. The Plaintiff and the Infant (the Mother acting as *prochein amy* of the Infant) filed a Bill against the Defendants for the performance of the Trusts of the Will. The Mother clandestinely took the Infant away from the Guardians, and was now secreting him.

*When a Suit is instituted for the administration of an Infant's Estate, the Court has jurisdiction over the Infant; and on the Petition of the Guardians, may order him to be delivered to them.*

The Defendants, as such Guardians, now applied by Petition to have the Infant delivered up to them, that they might have the management of him. By the Affidavits, filed in support of the Petition, the Mother appeared to be of a very objectionable character.

Mr. Agar, and Mr. Duckworth, for the Petition, contended, the Court had authority to make the Order; and cited *Eyre v. Countess of Shaftesbury* (a).

Mr. Fonblanque, *contra*, submitted, that the Guardians ought to proceed by *Habeas Corpus*.

Mr. Agar, in reply:—

In *Lord and Lady Westmeath*, Lord Eldon thought an *Habeas Corpus* was not so proper in these Cases as a Petition; because on the former no Appeal lies, and

(a) 2 P. Wms. 102.

1820.

WRIGHT  
and another

v.  
NAYLOR  
and another.

on the latter the Court may act in a more unfettered manner, according to what is best, and an Appeal lies.

The VICE-CHANCELLOR :—

It appears to me there is no difficulty in this Case, as all Persons concerned are before the Court in this Suit. In respect of the administration of the Property of the Infant, the Court has jurisdiction over his Person.—Let the Order be made, as prayed by the Petition.

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FORSYTH v. MANTON.

2d June.

*Terms of Compromise of a Suit and an Action, agreed upon out of Court, and afterwards disregarded, cannot be enforced on a Motion in the Suit.*

IN August last, Notice was given to the Defendant, that an application would be made by the Plaintiff that the Defendant might stand committed for the breach of an Injunction which had been issued to restrain him from making or vending certain Gun Locks and Machinery.

Before the Motion was made, the Defendant proposed to compromise all matters in dispute; and it was agreed that the Defendant should have Licence to make and sell Gun Locks and Pistol Locks upon the principle of the Plaintiff's invention, (for which a Patent had been granted to him,) during the term of the Patent, provided they were not sold to any other Gunmaker, or for the purpose of re-sale; and it was agreed in consideration of such Licence, and in satisfaction of the Damages and Costs claimed by the Plaintiff, the Defendant should pay the sum of 300*l.* with the Costs of the Agreement, and of all Costs sustained in any

Action or Suit between the Plaintiff and Defendant, and the Money was to be paid by certain fixed Instalments, and a Warrant of Attorney was to be given to secure the Money.

1820.

FORSYTH  
v.  
MANTON.

The Defendant afterwards refused to execute the Warrant of Attorney, and having paid the first Instalment, refused to pay the second. The Plaintiff then proceeded in his Action at Law, against the Defendant, for the second Instalment, and gave Notice of Trial, upon which the Defendant executed a *Cognovit* for 1,000*l.* and agreed that a Bill of Costs, amounting to 193*l.* incurred in the Chancery Suit, should be taxed by two Gentlemen, and if they differed, by one of the Masters of the Court of Chancery, and that the amount of the taxed Costs, together with the Sum mentioned in the *Cognovit*, should be considered as the Sum due from the Defendant. Afterwards, the Defendant neglected to attend the time appointed for the taxation of Costs.

Mr. *Romilly* now moved that it might be referred to one of the Masters to tax the Plaintiff's Costs in this Suit pursuant to such Agreement, and the *Cognovit* given by the Defendant in the Cause between the Parties depending in the Court of King's Bench, and also the Costs of this Application.

The VICE-CHANCELLOR:—

This Court has no jurisdiction to enforce an Agreement which is no part of the Suit, but has been privately come to by the Parties out of Court, and has not been made an Order of Court.

Motion refused.



1820.

## PORTER v. COX.

2d &amp; 16th June.

*Plaintiff becoming Bankrupt, a Special Motion must be made, and Notice served on the Assignees, that the Assignees may file a Supplemental Bill, in the nature of a Bill of Revivor, within a given time, or that the Bill may stand dismissed.*

**MR. BEAMS** moved, as of course, on a preceding day, 2d June, that the Assignees of the Plaintiff, who had become a Bankrupt after a Replication to the Answer, might file a Supplemental Bill in the nature of a Bill of Revivor, within a Fortnight, or that the Bill might stand dismissed; and upon that occasion the *Vice-Chancellor* said, it was not a Motion of course, but that the Assignees of the Bankrupt Plaintiff ought to be served with Notice of the Motion.

The Assignees having been served with Notice of the Motion, the same was, on the 16th June, renewed, and supported by an Affidavit of the facts. *Randall v. Mumford* (a) was cited. No Person appeared on behalf of the Assignees; and on an Affidavit of Service of the Notice of Motion being produced,

The *Vice-Chancellor* Ordered, that the Assignees should, within a Fortnight after Notice of the Order, file a Supplemental Bill, in the nature of a Bill of Revivor, against the Defendant; or in default thereof, the Plaintiff's Bill should stand dismissed.

(a) 18 Ves. 424.

*Ex parte* CARTER, *in re* PORTSMOUTH BANK.

1820.

2d June.

A MESSENGER, to whom a provisional Assignment and Bargain and Sale had been made under a Bankruptcy, died before Assignees were chosen.

*The Infant Heir of a Messenger, to whom, in Bankruptcy, a provisional Assignment had been made, and who died before the choice of Assignees, held, to be within the Statute of Anne.*

The question was, Whether the infant Heir of the Messenger was a Trustee of the real Estate of the Bankrupt within the Statute of *Anne* (a)? On a reference to a *Master*, he reported in the affirmative, and the *Vice-Chancellor* confirmed his Report.

Mr. *Montagu*, for the Petitioners.

(a) 7 *Anne*, c. 19.

QUANTOCK *v.* BULLEN and others.

Same Day.

THE Plaintiffs filed an Original Bill, and went into Evidence. They were then under the necessity of amending the Bill and adding Parties; and some of the Parties who were added as Defendants to the amended Bill, were Infants.

*After Witnesses were examined upon the Original Bill, an amended Bill was filed against new Parties, some of whom were Infants. The Court refused to order the Evidence taken on the Original Bill to be read against the new Defendants, the Infants.*

Mr. *Whitmarsh* now moved, on behalf of the Plaintiff, that he might be at liberty to read the Evidence upon the Original Bill, against the Defendants to the Amended Bill, on the hearing of the Cause; and observed, that the only object was to save Expense.

The Motion was not objected to on the part of the new Defendants.

1820.

QUANTOCK  
v.  
BULLEN  
and others.

The VICE-CHANCELLOR:—

The new Defendants who are adult, may, if they please, consent that the former Evidence should be read at the hearing, but I cannot order this Evidence to be read as against the Infants. The Case may, however, be such, that it may not be necessary to repeat the Proof, and that when the Cause comes on, the deficiency of Proof, as against the Infants, may be supplied before the *Master*.

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THOMPSON v. WILD.

7th June.

*Wherever a Plea is supported by an Answer, the Court, on the overruling of the Plea, will not give leave to amend.*

A PLEA of a Release, supported by an Answer, was put in in this Cause. On the Argument of the Plea, 3d May 1820, the Plea was overruled, it being deficient in some necessary averments, but an Order was made that the Defendant should be permitted to amend his Plea upon payment to the Plaintiff of 5*l.* Costs, and that the Plea and the Answer be taken off the File for that purpose, and on such Plea being amended, and, together with the said Answer, re-sworn, it was ordered that such Plea and Answer be re-filed; but the amendment was to be made on or before the first Seal before Trinity Term then next.

The Plea was accordingly amended, and the Answer also was altered in some material passages. The amended Plea and Answer now came on to be argued, and Mr. *Wetherell*, and Mr. *Maddock*, objected, that the Order did not justify any alteration in the Answer. Mr. *Bell*, and Mr. *Moore*, contended, that as the Plea

was allowed to be amended, it became necessary to alter the Answer in support of such amended Plea.

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The VICE-CHANCELLOR:—

The Order did not authorize any alteration in the Answer; but it is true that in this case it would have been nugatory to amend the Plea, unless the Answer could also have been altered. There is so much inconvenience in permitting any alteration in an Answer, that, as a general rule, I shall not, in future, give leave in any case to amend a Plea which is supported by an Answer.

The Plea must be overruled, with Costs, but to stand for an Answer, with liberty to except.

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LORD v. GENSLIN.

21st June.

PUBLICATION in this Cause passed on the 28th April 1820. On the same day the Plaintiff obtained the Six Clerk's Certificate, that Publication had passed, and carrying this Certificate to the Lord Chancellor's Secretary, obtained the usual Order that the Registrar should set down the Cause; and on the 2d May, the Registrar did set down the Cause accordingly. Easter Term ended on the 15th May. The Subpœna to hear Judgment was served on the 22d May, returnable on the 1st June, to hear Judgment on the 3d June.

*A Cause cannot be set down, unless by consent, in the same Term in which a Rule to pass Publication is given.*

Mr. Spence moved that the Subpœna to hear Judgment might be discharged, and the Cause struck out of the Registrar's Book, for irregularity on the ground

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that a Cause cannot be set down in the same Term in which Publication passes; and cited *Beames's Orders* (a); and observed, that Mr. Croft, the Registrar, had informed him that the Practice was as stated.

Mr. Koe, *contra*:—

The Orders mentioned in Mr. *Beames's* Book have not been followed. There has been a contrary Practice, and that is sufficient to abrogate an Order, as appears from *Boehm v. De Tastet* (b). The Six Clerks, for their own convenience, manage so as that most Rules to pass Publication expire at the end of the Term, and then they set down all the Causes together in which Rules to pass Publication have expired during the Term; but if Rules to pass Publication expire in the Term, there is nothing to prevent the Cause being immediately set down. This Cause, though set down in Easter Term, was not for hearing until Trinity Term, and therefore not within the Rule.

The VICE-CHANCELLOR:—

Mr. *Walker* concurs with the opinion stated to have been given by Mr. *Croft* (c), that a Cause cannot be set down in the same Term in which Publication passes, unless by the Consent of all Parties. The setting down a Cause is the setting down the same for hearing—to be heard.

Take your Motion.

(a) P. 319, 333, 335, 337.

(b) 2 Ves. & Bea. 328.  
Anon. MS.

(c) The Practice is so stated  
1 Ven. & Turn. 92 in note;  
and see 2 Madd. Prin. & Pract.  
449, edit. 2.

GREEN v. STAPLES and others.

1820.

20th June.

**ELIZABETH TATUM**, by her Will, 15th May 1798, devised as follows: "I give and devise all that my Messuage and Dwelling-house, &c. unto and to the use of *J. Staples* and *W. Snook*, their Heirs and Assigns for ever, in Trust, to permit and suffer *L. S. Green* to hold and enjoy the same, with the Grates, Furnaces and other Fixtures therein, during his life; and after his decease, his first and other Sons and Daughters now living, successively for life, as they were in priority of birth, but the Sons to be preferred in succession to the Daughters, and the Heirs of the body or bodies of such Sons and Daughters respectively issuing; and for default of such Issue, in Trust for my own right Heirs for ever." The Testatrix died in September 1798.

*Devise to Trustees, and their Heirs, of a Messuage and Premises, in Trust to permit L. S. G. to enjoy the same during his life; and after his decease, his first and other Sons and Daughters now living, successively for life, as they were in priority of birth, but the Sons to be preferred in succession to the Daughters, and the Heirs of the body or bodies of such Sons and Daughters respectively issuing; and for default of such Issue, in Trust for Testator's own right Heirs for ever.*

*L. S. Green*, the Plaintiff's Father, entered, and continued in the possession until his death, in October 1804. He left four Sons and a Daughter, who were all living at the date of the Will. The Plaintiff, his eldest Son and Heir at Law, entered into Possession and suffered a Recovery, and filed the present Bill against the Trustees, *Staples* and *Snook*, and against his three Brothers, (one of them, *Thomas Green*, was stated to be out of the jurisdiction of the Court,) and against his Sister and her Husband; *praying*, a Declaration that on the death

*L. S. G. enjoyed the Premises for his life; his Son entered, and suffered a Recovery; held, he was Tenant in Tail under the Will; and the Trustees were directed to convey to him in Fee, and deliver up the Title Deeds.*

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of his Father he became Tenant in Tail, and that by the Recovery he became Tenant in Fee, and entitled to have the legal Estate in Fee conveyed to him, his Heirs or Assigns, or as he should appoint; and that the Trustees might accordingly be decreed to execute to Plaintiff, or as he should appoint, all proper Deeds and Conveyances of the legal Estate of and in the said Messuage or Tenement and Premises, so as to perfect Plaintiff's Title to the Fee-simple and Inheritance of the said Premises; and that the Trustees might be decreed to deliver up to Plaintiff, as the absolute Owner of the said Estate, all the Title Deeds, Muniments, Documents and Writings relating thereto, in their possession, custody or power.

The Defendants, by their joint and several Answer, submitted, whether upon the death of *L. S. Green* the Father, his Son, the Plaintiff, became entitled as Tenant in Tail in Possession under the Will; or whether, according to the true construction of the Will, the several Sons and Daughters of *L. S. Green* were not entitled to successive Estates for life in the Premises, previous to the Limitation to the Heirs of the body of the said Sons and Daughters respectively?

Proof was adduced to show that *Thomas Green* was out of the jurisdiction of the Court.

Mr. *Wray*, for the Plaintiff.

Mr. *Tinney*, for the Defendants.

The VICE-CHANCELLOR:—

I think the true construction of this Will is, that the Heirs of the body are to succeed to the Parent, and

that the Plaintiff takes the same Estate Tail as he would have done if the Limitation had been to him alone for life, with Remainder to the Heirs of his body.

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and others.

Declare according to the Prayer of the Bill, and let the Plaintiff pay the Costs of the Defendants; the Trustees Costs to be taxed, as between Solicitor and Client.

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DESPREZ v. MITCHELL.

WHEN the Decree was made in this Cause, liberty was given to the Plaintiff to bring an Action in the Court of King's Bench against the Defendant, and certain admissions were directed to be made on both sides. An Action was accordingly brought, and the Defendant applied to the Plaintiff's Attorney for the usual undertaking as to a Security for Costs, where the Plaintiff is out of the jurisdiction; and before an Answer was returned, the time for pleading had nearly expired, and therefore a Summons was obtained from a Judge of the Court of King's Bench, to attend, to show Cause why the Defendant should not have a Month's further time to plead after the delivery of a Security for Costs to the satisfaction of the Master.

21st June.

*On a Decree, liberty was given to the Plaintiff to bring an Action in the Court of King's Bench, and an Action was brought.*

*The Defendant applied to a Judge of the Court of K. B. for the usual Order for a Security for Costs, the Plaintiff being resident at Paris, and so stated in his Bill. The Judge referred the Application to the Court of Chancery,*

On the Plaintiff's attending the Summons before Mr. Justice Best, and representing that the Action was directed by the Court of Chancery, he refused to make the Order; expressing an opinion, that an application for the Security for Costs should be made to the Court

*and the Court ordered such Security to be given.*



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of Chancery, but made an Order for a Week's further time to plead, on the usual terms of taking short Notice of Trial, &c.

A Motion was now made by Mr. *Shadwell*, that the Plaintiff, who styles himself in his Bill, as of *Paris*, in *France*, might be ordered to give Security, according to the course and practice of the Court of King's Bench, for all such Costs as the Plaintiff should become liable to pay to the Defendant in the Action which the Plaintiff was at liberty to bring against the Defendant, under the Decree made on the hearing of the Cause, in the Court of King's Bench, by reason of any *Non-pros*, Nonsuit, Discontinuance, or Verdict therein against the Plaintiff, or otherwise, under any Rule or Order of the Court of King's Bench; and that in the mean time, and until such Security should be given, all Proceedings in the Action which the said Plaintiff was, by the Decree, at liberty to bring, might be stayed by the Order of this Court, or that the Defendant might be permitted to apply to the said Court of King's Bench, or to a Judge thereof, for such Security to be given as aforesaid.

The VICE-CHANCELLOR :—

The Plaintiff must give a Security for Costs, according to the course and practice of the Court of King's Bench. If this Court meant, that the Plaintiff in an Action brought with a view to ultimate equitable Relief, should stand in a more privileged situation than an ordinary Plaintiff at Law, it would express its purpose in the Order.

*Ex parte* STANBOROUGH.

1820.

1st July.

**A** SEPARATE Commission issued against one of a Firm. The Petitioner was a joint Creditor, and had a joint Warrant of Attorney; he was also a separate Creditor of the Bankrupt. In respect of his joint Debt, he had taken out a separate Execution against the Bankrupt. He tendered proof of the separate Debt, but the Commissioners refused to allow it, unless he gave up his Execution. He now prayed that he might be permitted to prove his Debt.

*On a separate Commission, against one of a Firm, a joint and separate Creditor who in respect of his joint Debt had taken a Warrant of Attorney, and sued out a separate Execution against the Bankrupt, held entitled to prove his separate Debt, without giving up his Execution.*

Mr. *Hart*, and Mr. *Montagu*, for the Petitioners.

Mr. *Rose*, *contra*, opposed the Petition, on the authority of a Case, *Ex parte Hopley*, recently before the *Lord Chancellor*, where a joint Creditor, having a joint Execution upon a Warrant of Attorney, petitioned that he might take the Execution at the Amount, and prove for the difference, in order that he might be admitted to vote in the choice of Assignees; and his Lordship said, that no Order had ever been made in favour of a Creditor claiming under an Execution, and that he would not introduce such a Precedent; he insisted also that it was within Sir *S. Romilly's* Act.

The *Vice-Chancellor* distinguished this from the Case cited, observing, that this was a joint Debt, and the Execution in a joint Action, and that it did not affect his right to prove in respect of a distinct separate Debt.

Petition granted.

1820.

3d July.

## BROCKSOPP v. BARNES.

*Executor and Trustee cannot claim Compensation for personal Trouble and loss of Time in the performance of Trusts under a Will, but should have made a special Case for Compensation before he entered on the performance of the Trusts.*

**JOHN BROCKSOPP**, by his Will, 11th October 1812, directed certain Businesses to be carried on by his Trustees and Executors, and directed several other onerous Trusts to be performed by his Trustees, but gave no Legacies to them, or reward for their trouble. **Barnes**, the Defendant, by Petition stated, that he had devoted considerable time, and had travelled many hundred miles, in respect of the Testator's concerns as Trustee, and prayed that it might be referred to the *Master*, to ascertain what would be proper to be allowed to the Petitioner as a compensation or recompense for his loss of Time, personal Trouble, and Expense in the management and settlement of the Testator's affairs, and to certify out of what Fund it ought to be paid.

Mr. *Bell*, for the Petitioner.

Mr. *Maddock*, for the Plaintiffs, who were Infants, said he was instructed not to oppose the Petition.

The VICE-CHANCELLOR:—

This Trustee is of course entitled to all reasonable Expenses which he may have incurred in the conduct of the Trust, and requires no Order for that purpose. But the general rule must be applied to him, that a Trustee is not entitled to Compensation for personal Trouble and loss of Time.

If the nature of the Trust be such that a Trustee

ought not to undertake it without Compensation, a special Case must be made in this Court, before the Trust is accepted.

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BARNES.

*Ex parte* BOTTOMLEY *in re* CROWTHER.

1st July.

ON Petition, the *Vice-Chancellor* declared that the petitioning Creditor was entitled to Costs incurred in resisting, successfully, a Petition to supersede the Commission, and ordered the Assignees to pay him out of the first Monies in their hands.

*Petitioning Creditor allowed his Costs of resisting an Application to supersede the Commis-*

*sion, out of the Bankrupt's Estate*

WHITCOMB v. MINCHIN.

4th July.

IN this Case, the *Vice-Chancellor* held, that as a Trustee for the sale of an Estate could not purchase the Estate himself, so the Agent of the Trustee employed for the purpose of sale could not purchase it. The Suit having been instituted against the Agent before his Bankruptcy, and his Assignees having been made Parties by a Supplemental Bill, a question was made as to the Costs of the Suit. The *Vice-Chancellor* stated, that Assignees brought before the Court by Supplemental Bills, might be made liable to the Costs of the whole of the Suit, where they improperly resist the Plaintiff's demand; but he refused to give Costs against the Assignees in the present Case, because the Plaintiff had made no application to them upon the subject of the Suit, before the filing of the Supplemental Bill.

*The Agent of a Trustee for the Sale of an Estate, employed for the Sale of the Estate, cannot purchase the same.*

*Assignees who are brought before the Court by a Supplemental Bill, may be made liable to the Costs of the whole Suit.*

1820.

5th July.

ALFORD and Ux. v. GREEN and others.

*A Testator possessed of 5,000*l.* 3 per cent. Consols, bequeathed 2,000*l.* thereof to his Trustees, in Trust as to 1,000*l.* for G. and as to 2,000*l.* for W. C. Held, that the Testator meant to give his Trustees 3,000*l.* 3 per cent. Consols, the Bequest to them of the 2,000*l.* 3 per cent. being only mentioned once, and the Legacy of 2,000*l.* to W. C. being mentioned twice.*

*B. COWARD*, by his Will, 18th October 1801, bequeathed to his Trustees therein mentioned, the sum of 1,500*l.* 4 per cent. Bank Annuities, standing in his name, upon certain Trusts therein and after mentioned, and then bequeathed as follows: “ *Item*, I give, devise and bequeath unto my said dear Wife, (meaning *Mary Coward*, afterwards his Widow, and since deceased), *Charles Green* and *John Wright*, two of the Defendants, my Trustees, the several further sums of 3,500*l.* 4 per cent. Bank Annuities, and 2,000*l.* 3 per cent. Bank Annuities, now standing in my name; and also the sum of 600*l.* due upon Mortgage, &c. upon this special Trust and Confidence that they, my said Trustees, do receive and take the Interest of the said Annuities, from time to time, and also to call in the said Mortgage Money, and lay out the same in the Funds as they may think proper; and pay, apply and dispose thereof, and of the several parts thereof, in manner following; (that is to say,) as to, for, and concerning the Interest to arise from 2,000*l.* part of the said 4 per cent. Annuities, to pay the same to my said Neice *J. B. Gapper* (since deceased,) during the term of her natural life; and at her decease to pay, apply and dispose of the said principal sum of 2,000*l.* Annuities, to such Person or Persons as she, my said Neice shall, by her last Will and Testament duly executed in the presence of two credible Witnesses, direct, limit and appoint; and as to the Interest of the Sum of 1,000*l.* other part of the said 4 per cent. Annuities, and 1,000*l.* part of the said 3 per cent. Annuities, to pay the same unto

the said *J. B. Gapper*, for and during the term of her natural life; and at her decease to pay, apply and dispose of the said two last-mentioned principal Sums, to such Person or Persons as she may, by her last Will and Testament duly executed as aforesaid, direct, limit and appoint; and as to the Interest of the sum of 2,000*l.* other part of the said 3 per cent. Annuities, to pay the same to the said *William Coward*, and to his Wife, and to the Survivor of them, for and during the term of their natural lives, and the life of such Survivor; and after the decease of such Survivor, I give and bequeath the said last-mentioned sum of 2,000*l.* Annuities unto and amongst all and every the Child and Children of the said *William Coward* that may be then living, equally to be divided among them, if more than one, share and share alike; and if only one, then to such only Child, and to his or her Executors or Administrators;" and the Testator, after bequeathing to certain Persons therein mentioned, the sum of 500*l.* the residue of the said sum of 3,500*l.* 4 per cent. Annuities, and of the said sum of 600*l.* due upon the said Mortgage, and several other legacies, bequeathed all the rest, residue and remainder of his Estate and Effects whatsoever unto his Wife for her life; and after her decease, to the Plaintiff *Frances Jane Coward Alford*, by the name of *Jane Coward Gapper*, and described as the Daughter of his said Niece *J. B. Gapper*, and to her Heirs, Executors, Administrators and Assigns; and he appointed his Wife and the Defendants *Charles Green* and *John Wright*, Executrix and Executors of his Will.

The Testator's Widow, and also *Charles Green* and *John Wright*, proved the Will.

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The Testator's Widow died in 1802.

The residuary Legatee, *F. J. Coward*, intermarried with the Plaintiff, and on calling for an Account against the surviving Executors, they insisted on an Allowance out of the Testator's 3 per cent. Stock, to make good the Deficiency of the Sum given to them in Trust, to answer the Legacies of the 3 per cent. Stock given by the Testator to *J. B. Gapper* and *William Coward* and his family.

The Bill, stating these facts, charged that there was a Mistake in the Figures or Sums in the Will; and that no more than 2,000*l.* 3 per cent. Stock ought to have been transferred; and the Bill *prayed*, an Account for and Transfer to the Plaintiffs, in right of the Plaintiff *F. J. Coward*, of the said sum of 1,000*l.* 3 per cent. Stock, and the Dividends thereof.

The Defendant *Green*, the principal acting Executor, by his Answer, stated, that the personal Estate of the Testator was of the value of 1,111*l.* 16*s.* 6*d.*, or thereabouts, exclusive of the several sums of 5,000*l.* 3 per cents. and 5,000*l.* 4 per cents. and 600*l.* due on Mortgage, and his belief that it was the intention of the Testator that *Mrs. Gapper* should have 1,000*l.* 3 per cent. Annuities, and that said *William Coward* and his Family should have 2,000*l.* 3 per cent. Annuities; and that a Mistake was made by the Person who prepared the Will, by inserting 2,000*l.* instead of 3,000*l.* 3 per cent. Annuities, in the Bequest to the Trustees; or otherwise that it was the intention of the Testator that the said Legacy to *William Coward* and his Family should be paid out of

his 3 per cent. Stock generally, and should not be paid out of the parts which he had before specified; and that Defendant is confirmed in his belief of such being the intention of said Testator, from the conversations which passed between the Defendant and the Testator in his life-time, on the subject of the Bounty intended by the said Testator to the said *William Coward* and his Family, and by the circumstance of the Testator being possessed of 5,000 *l.* 3 per cents. at the time of making his Will.

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The Answers of the other Defendants insisted there was a Mistake in the Will, of the nature stated in the Answer of *Green*.

Mr. *Bell*, and Mr. *Roupell*, for the Plaintiffs.

Mr. ——— for the Defendants.

The VICE-CHANCELLOR:—

I cannot conclusively assume, from the Answer of the Executor, that the Testator at the making of his Will, and at his death, was possessed of a larger sum than 2,000 *l.* 3 per cent. Annuities, and I must therefore, in the first place, send it to the *Master*, to inquire what 3 per cent. Stock the Testator was at those times possessed of. The Testator gives to his Trustees 2,000 *l.* 3 per cent. Annuities, standing in his name. The Gift is therefore specific. He then, out of this 2,000 *l.* Stock, first gives a sum of 1,000 *l.* Stock, and then a further sum of 2,000 *l.* Stock, and he twice repeats this sum of 2,000 *l.* Either there is a Mistake in the aggregate amount given to the Trustees, or in the individual amount given to the Legatees. I think it more probable



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that the Mistake should occur in the aggregate amount than in the individual Gifts, and when he twice repeats the Gift of 2,000 *l.* to *W. Coward* and his Family, it is difficult to conclude that he meant only to give them 1,000 *l.*

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## SCOTT v. BEECHER and Ux.

7th July.

*Mortgagor of a Copyhold, devises the same Copyhold to his Wife, together with his personal Estate, and appoints her Executrix.*

*She dies without paying off the Mortgage.*

*Held, that her Heir is not entitled to have the Mortgage paid out of the personal Estate of the Mortgagor.*

*JOHN TYSON* being entitled to a Copyhold Estate to him and his Heirs, according to the custom of the Manor, mortgaged the same, on the 9th October 1811, to *Richard Mills* to secure 1,000 *l.* and afterwards surrendered the same to *Mills* and his Heirs pursuant to the Covenant in the Mortgage Deed. *Tyson* also gave his Bond to *Mills* for payment of the Money advanced. The Mortgage Money was not paid at the appointed time.

*Tyson*, died in November 1814, and by his Will, 14th December 1813, devised all his Estate and Effects to his Wife, *Elizabeth Tyson*, and in particular his Copyhold Estate, and appointed her Executrix; and she proved the Will, and was admitted to the Copyhold, subject to the Mortgage; she died in May 1816, without Issue, leaving her Brother, the Plaintiff, Heir-at-Law, according to the custom of the Manor.

In February 1819, Letters of Administration of the unadministered Estate of *John Tyson* were granted to the Plaintiff and the Defendant *Frances Beecher*, the Wife of the other Defendant *Alexander Beecher*, and upon the death of *Elizabeth, Tyson*, Letters of Admi-

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nistration of her Estate, were also granted to the Plaintiff and the said *Frances Beecher*.

*Richard Mills*, the Mortgagee, threatened to proceed to recover by Ejectment the mortgaged premises, whereupon the Plaintiff filed the present Bill, insisting that he ought to have the Mortgage paid out of the personal Estate of the Mortgagor, he having left Assets more than sufficient for that purpose, and the Prayer of the Bill was accordingly.

The Defendants by their Answer admitted that the Assets of *James Tyson* were more than sufficient for the payment of his Funeral Expenses and Debts, including the Mortgage Debt and Interest thereon, and that *E. Tyson* had in her life-time possessed Assets of *James Tyson* more than sufficient to pay all Debts, including the Mortgage, and that at her death there was also outstanding of *James Tyson* sufficient to pay the Mortgage; but they submitted, that under the circumstances, the Plaintiff must take the Copyhold Estate, subject to and chargeable with the Mortgage Debt, and that he was not entitled to have the personal Estate applied in discharge of the Mortgage.

Mr. *Pepys*, and Mr. *Walker*, for the Plaintiff:—

The Heir of *Elizabeth Tyson* takes the Estate, as she did. She was Devisee of the mortgaged Estate, and had the residue of the personal Estate also of the Mortgagor bequeathed to her. She did nothing respecting the Mortgage, and died intestate. As Devisee, she was entitled to apply the personal Estate in discharge of the Mortgage; so must her Heir. She might determine to take the Copyhold Estate *cum onere*, or

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to discharge the Mortgage out of the personal Estate, but she died without expressing any intention either way, or manifesting any option. The personal Estate was the primary Fund for the payment of the Mortgage Debt, and the auxiliary security, the real Estate, ought not to be charged, unless some manifest intention appeared on the part of *Elizabeth Tyson* to exonerate the personal Estate. There is no case we have been able to discover that has decided this point, *Evelyn v. Evelyn* (a) decides only that the personal Estate is the primary Fund for the payment of a mortgage Debt. The Assets of the Mortgagor were augmented in consequence of the Mortgage. If the Case be doubtful, the Court will be disposed to favour the Heir at Law.

Mr. *Lovatt*, and Mr. *Palmer*, for the Defendants, were stopped by

The VICE-CHANCELLOR :—

*Elizabeth Tyson* was Devisee of the Copyhold Estate, and was also residuary Legatee and Executrix of the Mortgagor. If she had thought fit, she might have paid off the Mortgage out of the personal Estate of her Husband, for it is admitted that she possessed Assets sufficient to pay all the Debts, including the Mortgage, and it may therefore be said that she elected to continue the Mortgage as a Charge on her real Estate. But I apprehend this is not a Case in which her personal representative is bound to make out any such fact of election. By the gift to her as residuary Legatee, the personal Estate of *James Tyson* became her personal Estate, but the Mortgage Debt of *James*

(a) 2 P. Wms. 664.

*Tyson* was not her Debt, and her Heir therefore has no equity to pay off this Mortgage out of her personal Estate.

The Bill was dismissed, with Costs.

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LEONARD BEECHER MORSE, CHARLOTTE FELICIA FINLEY, JULIANA WATSON, ATHERTON WATSON, and WENMAN LANGHAM WATSON, Executor of *Camilla Matilda Watson*, deceased, - - - - - Plaintiffs;

and

WALTER Marquis of ORMONDE, WILLIAM GRESLEY, THOMAS HOLLOWS, JOHN RICKMAN, RALPH ADDERLEY, and JOHN BEAUMONT, - - - - - Defendants.

10th July.

IN 1797, Mrs. S. P. Clarke, the Wife of J. H. P. Clarke, having an absolute power of Appointment (a) *Testatrix by her Will limited by Will or otherwise, notwithstanding her Coverture, certain Estates over the Reversion or Remainder in Fee Simple of divers Manors, &c. in Derby and other Counties, expectant upon certain Estates in Tail Male limited successively to her Son, G. T. R. Price Clarke, herself* *to her Daughter Lady O. for life, Remainder to her first and other Sons successively in Tail Mail; Remainder to her Daughters as Tenants in common in Tail General; and if an only surviving Daughter, to her in Tail General; and in Default of all such Issue of Lady O. to Trustees for 1000 years, upon Trust, to raise certain Legacies as she should bequeath, by any Codicil or Codicils; and she afterwards by Codicil bequeathed certain Legacies, after the decease and failure of issue of her Daughter Lady O. Lady O. died without Issue.*

*Held that the Legacies were payable when the Term was to take effect.*

(a) It did not appear on the pleadings how she acquired this power.

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the said *S. P. Clarke*, and *Clement Kynnersley*, and she, by her Will, 22d Day of December, 1797, devised as follows: “ I, *S. P. Clarke*, Wife of *J. H. P. Clarke*, of, &c. do by force and virtue of all and every Power and Powers given to and vested in me for that purpose, in and by any Deed or Deeds of Settlement, Fine or Fines made, levied and executed by me and my said Husband, and of all and every other Power and Powers whatsoever in me vested, or in any wise enabling me, notwithstanding my Coverture, in this behalf make, publish, and declare this my last Will, and Appointment in nature of a Will, in manner following, (that is to say) I give and devise, direct, limit and appoint, all that the Reversion or Remainder in Fee Simple expectant, or to take effect in possession on the several deceases of my Son, *G. T. R. P. Clarke*, myself, and *Clement Kynnersley* respectively, without Issue Male; of and in all and every the Manors, &c.; and also all other real Estates whatsoever and wheresoever in Possession, Reversion, Remainder, or Expectancy over which I have any disposing Power, unto and to the use of *T. W. Hunloke*, Esq. of, &c., the Rev. *Wm. Gresley*, of, &c., *James Houson*, of, &c., and *Wm. Spear*, of, &c., their Heirs and Assigns for ever; but upon Trust, to convey and settle the same in manner following, (that is to say,) to the use and intent, that my Daughter, *A. M. C. Clarke*, or her Guardian or Guardians, may receive thereout during her Minority, or until she shall marry, with the consent, in writing, of such Guardian or Guardians, one Annuity or clear yearly Sum of 1,000*l.* for and towards the maintenance, education and support during such Minority, or until her marriage, with such consent as aforesaid, and subject thereto, to the use of my Husband, *J. H. P. Clarke*,

and his Assigns, *sans waste*, for and during the joint Lives of him and my said Daughter, or until she my said Daughter shall attain the Age of 21 years, or marry with such consent as aforesaid, which shall first happen; and when and so soon as my said Daughter shall attain the age of twenty-one years, or marry with such consent as aforesaid, which shall first happen, then to the use and intent that one full moiety of all the aforesaid Estates, in case her Father shall be then living, but if dead, or from and after his decease, then that the whole of the same Estates may be limited to one or more Trustees, (to be nominated by my said Daughter,) his or their Heirs, during the Life of my said Daughter, in Trust, to pay and apply the Rents, Issues and Profits thereof, for her sole and separate use, exclusive and independent of any Husband with whom she may intermarry and not to be subject or liable to his Debts or Engagements; and as to the other moiety of all the said Estates, from and after the Marriage of my said Daughter, or attaining the age of twenty-one years, which shall first happen as aforesaid, To the use of my said Husband, *J. H. P. Clarke*, and his Assigns, for and during the Term of his natural life, without Waste, with Remainder, after the death of my said Daughter, as to one moiety of all the said Estates, in case her Father shall be then living, but if then dead, and from and after his death, then as to the whole thereof, *To the use of the first and other Son and Sons of my said Daughter successively in Tail Male, with Remainder, in default of such Issue, To all and every the Daughter and Daughters of my said Daughter, if more than one, as Tenants in common in Tail, with Cross-Remainders between them in Tail, and with Remainder to an only or only surviving Daughter in Tail, with Remainder,*

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*in default of all such Issue of my said Daughter, as to one moiety, or the whole, as the event may happen, of all the aforesaid Estates, To the use of one or more Trustee or Trustees, to be for that purpose named, their Executors, Administrators and Assigns, for the term of 1000 Years, without impeachment of Waste, upon Trust, by the usual ways and means, to raise and levy such Legacies or Sums of Money as I have hereinafter given and bequeathed, or shall by any Codicil or Codicils thereto, hereafter give and bequeath, and pay the same to the Persons respectively hereinafter, or in and by such Codicil or Codicils named or to be named; and as to the said moiety, or the whole, as the event may happen, of the said Estates, to be comprised in the said Term of 1000 Years; from and after the end, expiration, and other sooner determination thereof, and subject in the mean time thereto, and to Trusts thereof, To the use of my said Husband, the said J. H. P. Clarke, his Heirs and Assigns for ever; in which said Settlement so to be made as aforesaid shall be contained the usual limitation to one or more Trustee or Trustees during the life of my said Daughter and Husband respectively, as the case may require, for preserving contingent Remainders, and the usual powers of leasing, to the respective Tenants for Life, for twenty-one years, at the best Rents, and under the usual restrictions. And also a power for my said Daughter to charge the said Estates with portions for younger Children, in case of Issue Male, not exceeding 20,000*l.* if only one younger Child, 30,000*l.* if two or more, 40,000*l.* if three or more such Children, to be raised and paid at such age or ages, days or times, and in such shares and proportions, manner and form, as she my said Daughter shall or may order, direct or appoint; and also all such other powers as are usually inserted in Settlements of the*

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like nature, or as Counsel shall advise. *I give and bequeath, from and immediately after the death of my said Son G. T. R. P. Clarke, and the said Clement Kynnersley respectively, without Issue Male, and the decease and failure of Issue of my said Daughter, A. M. C. Clarke, the several Legacies or Sums of Money hereinafter mentioned (that is to say) the Sum of 20,000*l.* equally between and amongst the four younger Children of the late Catherine Watson, who was Sister, &c. the Sum of 5,000*l.* to C. Kynnersley, Sister of the said Clement Kynnersley; the Sum of 5,000*l.* to Becher Morse, only Son of, &c.; the Sum of 3,000*l.* to H. S. Hunloke, Daughter of, &c.; and the Sum of 2,000*l.* to H. E. Hunloke, Esq. and do hereby give and bequeath, from and immediately after my decease, unto the aforesaid T. W. Hunloke, William Gresley, James Houson, and William Spear, or such of them as shall survive me, the Sum of 500*l.* a-piece, to be paid within three calendar months next after my death, by and out of my moiety of the surplus Rents and Profits of the aforesaid Estates, and such other Monies or personal Estates as are settled upon me, or made subject to my disposition: And from and after payment of the said last-mentioned Legacies of 500*l.* a-piece to my said Trustees, I give and bequeath all the remainder of the Monies whereout the same are directed to be paid as aforesaid, which shall remain after payment thereof, unto my Husband, J. H. P. Clarke, to and for his own use and benefit: And I constitute and appoint my said Husband, J. H. P. Clarke, sole Executor of this my last Will and Testament; and for the better securing the payment of the said last-mentioned Legacies, charge the reversion of the aforesaid Estates hereinbefore devised to and with the payment thereof."*



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*S. P. Clarke* made several Codicils to her Will; and by the first of such Codicils, bearing the same date with her Will or Testamentary Writing, she gave to the said *T. W. Hunloke* and *William Gresley*, 500 *l.* a-piece, and to the said *James Houson* and *William Spear*, 2,000 *l.* a piece, to be paid within Six Months after the death of herself and Son, and the said *Clement Kynnersley* without Issue Male, the same to be in lieu of the Legacies given by her Will; and she charged the Estates devised by her said Will with payment thereof; and by the second of such Codicils, bearing date the 27th day of May 1800, the said *S. P. Clarke* revoked the appointment of the said *T. W. Hunloke* as a Trustee under her Will, and revoked the Legacies given to him by her said Will, and the first Codicil thereto; and by the third of such Codicils, bearing date the 2nd day of July 1801, the said *S. P. Clarke* revoked the appointment of the said *James Houson* as a Trustee under her Will, and the Legacies given to him by her said Will, and the first Codicil thereto, and appointed *Thomas Hollows*, of *Clapwell*, in the County of *Derby*, Esq. to be a Co-trustee under her said Will, with the said *William Gresley* and *William Spear*; and by the fourth and last of such Codicils, bearing date the 9th day of September 1801, the said *S. P. Clarke* revoked the appointment of the said *William Spear* as a Trustee under her said Will, and the Legacies given to him by her Will, and the first Codicil thereto, and thereby gave and devised, directed, limited and appointed, all that the said Reversion or Remainder of and in the said Manors, &c. unto and to the Use of the said *William Gresley*, *Thomas Hollows*, and *John Rickman*, Esqrs. and to their Heirs and Assigns, exclusive of the said *William Spear*, but upon such Trusts,

and for such intents and purposes, as in and by her said Will are mentioned and declared of and concerning the same; and she thereby in all other respects ratified and confirmed her said Will, and the several Codicils thereto.

*S. P. Clarke* died in January 1802. The Will and Codicils, or Writings in the nature of a Will and Codicils, were proved by the said *J. H. P. Clarke*, the Husband.

*S. P. Clarke* left the said *G. T. R. P. Clarke*, her only Son, and the said *A. M. C. Clarke*, her only other Child, her surviving; and in 1805 the said *A. M. C. Clarke* intermarried with the Marquis of *Ormonde* (then Earl of *Ormonde* and *Ossory*).

*G. T. R. P. Clarke*, and *Clement Kynnersley*, afterwards died, without leaving Issue Male living at their respective deaths, and without having barred the entail of the said Estates; and thereupon, and previously to the Year 1809, the said Reversion or Remainder of and in the several Estates, Hereditaments and Premises therein before mentioned, contained in the Will of the said *S. P. Clarke*, took effect in Possession in the said *J. H. P. Clarke* and *A. M. C. Marchioness of Ormonde*.

By Indenture, 16th day of June 1809, between the said *J. H. P. Clarke*, of the first part, *John Rickman* and *Richard Williams*, of the second part, and the Marquis of *Ormonde* (then Earl of *Ormonde* and *Ossory*) and *A. M. C. Marchioness of Ormonde* (then Countess of *Ormonde* and *Ossory*) of the third part; the said several Manors, &c. so devised by the Will of the said *S. P. Clarke* as aforesaid, were subject to the several Legacies or Sums

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of Money charged upon the same by the Will of the said *S. P. Clarke* limited, from and after the decease of the said *A. M. C. Marchioness of Ormonde* and failure of Issue of her Body, as to one undivided moiety of the said Estates to the use of the Marquis of *Ormonde*, his Heirs and Assigns; and as to the other undivided moiety thereof, to such uses, upon and for such trusts, intents and purposes, and with, under, and subject to such powers, provisoes, declarations and Agreements, as the said Marchioness of *Ormonde*, by any Deed or Instrument in Writing, with or without power of revocation and new appointment, executed as in the said Indenture is mentioned, or by her last Will and Testament in Writing, or any Codicil thereto, or and Writing in the nature of or purporting to be her last Will and Testament, or a Codicil thereto, notwithstanding her then present or any future Coverture, or whether she should be sole, or married, should direct, limit or appoint.

The Marchioness of *Ormonde*, by her Will, 2d day of March 1817, after reciting the powers vested in her by the said last-mentioned Indenture, did, by force and virtue, and in exercise and execution thereof, and of every other Power and Authority in her vested, or in any wise enabling her in that behalf, direct, limit and appoint, that all the undivided moiety over which she had a power of appointment by virtue of the same Indenture of the 16th day of June 1809, or by any other Power or Authority of and in the said Manors, &c. of or belonging to her the said Testatrix, whether in Possession, Remainder or Expectancy, or over which she had any power or authority, should, after failure of Issue of her Body, go and remain to the use of the said *J. Rickman, P. Gell, of, &c. Richard Williams, of*

&c. and *John Allen Powell*, of, &c. their Heirs and Assigns, upon and for the Trusts, intents and purposes thereafter expressed and contained of and concerning the same (that is to say), as to all and every the said Manors, &c. with the Appurtenances, except an Estate called *Chilcot*, in the County of *Derby*, which Estate was thereafter by her Will specifically disposed of upon Trust for the Marquis of *Ormonde*, his Heirs and Assigns for ever; and as to the said Estate called *Chilcot*, in Trust, subject as therein mentioned, for the said *Walter* Marquis of *Ormonde*, and his Assigns for his Life, without impeachment of or for any manner of Waste; and after his decease, in Trust, for *Edward Sacheverell Chandos Pole*, of *Radbourne*, in the County of *Derby*, Esq. the eldest Son of the late *Sacheverell Chandos Pole*, of *Radbourne*, aforesaid, Esq., during his natural Life, without impeachment of Waste, with Remainder to his first and other Sons in Tail Male, with Remainder to *Reginald Chandos Pole*, for Life, with Remainder to his first and other Sons in Tail Male; with Remainder to *German Chandos Pole*, for Life, with Remainder to his first and other Sons in Tail Male, with Remainder to the Daughters of the said *Edward Sacheverell Chandos Pole*, as Tenants in common in Tail, with Cross-Remainders; with Remainder to the Daughters of the said *Reginald Chandos Pole*, in Tail, with Cross-Remainders, with Remainder to the Daughters of the said *German Chandos Pole*, in Tail, with Cross-Remainders, with Remainder to the right Heirs of the said *Edward Sacheverell Chandos Pole*, for ever. And the said Testatrix, after giving divers Legacies and Annuities, declared it to be her Will and Desire that all and every the Annuities, Legacies, and other Sums or Sum of Money, whether annual, or in gross, which she had bequeathed in and by her said Will to any Person or Persons whomsoever,

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or which she should bequeath, or direct to be paid by any Codicil to her said Will, or Testamentary Papers signed by her, or in her own Hand Writing, whether witnessed or not, except as therein mentioned, should be charged or chargeable on the said *Chilcot* Estate alone, exclusive of all the other Estates mentioned or referred to in her said Will, and be paid and payable thereout, any directions in her said Will to the contrary thereof notwithstanding. And *she also declared it to be her Will and Desire that the several Legacies and Sums of Money left by her late Mother, by her Will, or any of the Codicils thereto, should be considered as charged on all Estates generally, and be borne by them in proportion to there respective relative value, and such value, if disputed, to be ascertained and settled by her said Trustees and Executors; and the said Testatrix appointed the said J. Rickman, P. Gell, Richard Williams and J. A. Powell, Executors of her said Will.*

*J. H. P. Clarke* died in the Life-time of the said *A. M. C. Marchioness of Ormonde*, intestate, leaving the said Marchioness, his only Child and Heir at Law; and the said *A. M. C. Marchioness of Ormonde*, died in the month of November 1817, without ever having had any Issue; and thereupon the said *Walter Marquis of Ormonde* entered into possession of, and has since been, and now is, in possession of all the said Estates, Hereditaments and Premises devised by the Will of the said *Sarah Price Clarke*.

*Philip Gell*, one of the Trustees and Executors named in the said Will of the said *A. M. C. Marchioness of Ormonde*, disclaimed the execution of the Trusts reposed in him by the same Will, and released all his Rights and Interests therein.

No Settlement of the said Estates had ever been executed by the Trustees of the said Will and Codicils of the said *Sarah P. Clarke*.

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A Bill was filed by the Legatees of *S. P. Clarke*, to compel Payment of the Legacies, and the question was, Whether under the circumstances the Legacies were valid, or too remote and void ?

Mr. *Hart*, Mr. *Shadwell*, and Mr. *Pemberton*, for the Plaintiffs:—

The Plaintiffs are clearly entitled to the Legacies. It will be said on the other side, that the Term was to arise on the failure of Issue Male of the Sons of Lady *Ormonde*, and on failure of Issue general of the Daughters of Lady *Ormonde*; and that the Term would therefore arise, although there should happen to be a Daughter of a Son surviving; whereas the Legacies are given only upon Default of all Issue of Lady *Ormonde*, and therefore that the Legacies not being to take effect when the Term does, nor upon the determination or prior Estates-Tail, but after an indefinite failure of Issue, are too remote and void.

The Testatrix, Mrs. *P. Clarke*, meant that the Term should be raised on the failure of the successive Estates-Tail Male, which had been limited to herself, her Son, and *Kynnersley*, and on failure of the Estates-Tail limited to the Sons and Daughters of her Daughter, and that the Legacies should be paid at the same period when the Term was to arise out of which they were to be paid. There was no other object in raising the Term, except for the payment of the Legacies.

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The Will of Mrs. *P. Clarke* created an executory Trust. *Jones v. Morgan* (b), *Ferrers v. Ferrers* (c), *Agar v. Agar* (d), and *Langham v. Standford* (e). It may be contended, that to give effect to the Legacies in question, the Court (notwithstanding *Lanesborough* and *For*) (f) will hold, that according to the Will and Codicil of Mrs. *Price*, the Issue Female of her Sons took an Estate-Tail by implication; and that her intention was, that on failure of all Issue of her Daughter at her death, the Term was to be raised, and the Legacies paid; and there is enough in the Will to warrant that construction, it being the Case of an executory Trust. Supposing this view of the Case not tenable, and that the Legacies are given at a period so remote as to be bad, yet as the Marchioness of *Ormonde* has by her Will charged them upon certain of her Estates charged with the Legacies, supposing they cannot be claimed under the Will of Mrs. *Price*, her Mother, they are claimable under the Will of the Marchioness of *Ormonde*.

Mr. *Bell*, Mr. *Wetherell*, Mr. *Horne*, Sir *George Hampson*, and Mr. *Skirrow*, for the Defendants:—

The Testatrix does not appear to have known the nature of her interests in these Estates, and owing to that mistake, the Legacies she has given must fail. The Case must be argued as if a Son of Lady *Ormonde* had left a Daughter. The term is limited to take effect “on failure of all such Issue of my said Daughter,” that is, such Issue as is before mentioned, and is

(b) 1 Bro. C. C. 206.

(e) Not yet reported.

(c) 6 Bro. P. C.

(f) For. 262.

(d) 12 East, 253.

therefore good; but the Legacies are limited to take effect after the death of the Son of the Testatrix, and of Mr. *Kynnersley* respectively, without Issue male, and the decease and failure of Issue of her Daughter *A. M. C. Clarke*; that is, after a general failure of Issue of her Daughter; so that if her Daughter had left no Daughters, or Issue of Daughters, but only a Son who had left Issue a Daughter, though the Term might have taken effect in Possession on his death, the Legacies would not have been payable until after the Issue of that Son was extinct. and are therefore too remote and void.

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She never meant the Legacies to take effect until failure of the Issue of Sons and Daughters.

But the Court cannot say the mistake in not limiting the Estate to the Daughters of a Son could be supplied. The Court does not interpose to correct expressions according to the intention, where plain words are used, but only where incorrect words are used. In this Case in particular, the Legatees, mere strangers, could not call for an execution of the Trusts according to the intention, supposing the Children or Grandchildren could. These words must have effect given to them as they stand, and an Estate-Tail to Daughters of a Son of the Marchioness of *Ormonde* cannot be implied.

In *Lanesborough* and *Fox (g)*, (which is a land-mark in cases of this nature,) there was a mistake in the Will; but the Court would not imply an Estate-Tail, though the intention was clear. When *Jones v. Morgan*



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came on before Lord *Thurlow*, he partly adopted the Certificate of the Court of King's Bench, but did not concur in that part of the opinion, which was contrary to *Lanesborough* and *For*; and the opinion of Lord *Thurlow* was confirmed on an Appeal to the House of Lords. If the word "*such*" were omitted, or struck out, in the former part of the Will, there would be no inconsistency between the two parts of the Will; and if the word "*such*" is inserted in the latter part of the Will, the difficulty is equally got over. The Testatrix intended the Term to commence and the Legacies to be paid, at the same time; but as she has directed the Term to commence at one period, and the Legacies to be paid at another, and as the Court has no means of saying whether she meant the period when the Legacies were to be paid should be accelerated, or the time for raising the Legacies delayed, the Court must act upon the words as they stand, and the Legacies being given after a general failure of Issue, are void. There is a mistake, but what the intention of the Testatrix was, is not clear.

The Will of the Marchioness of *Ormonde* was not intended as a confirmation of Legacies which she understood to be void, but supposing them good, she makes a provision for them. That is not a confirmation of them. Lord *Coke* (*h*) says as to confirmations, *Confirmatio est nulla ubi donum præcedens est invalidum, et ubi donatio nulla omnino nec valebit confirmatio.*

The VICE-CHANCELLOR :—

This Testatrix having limited certain Estates to her Daughter Lady *Ormonde* and her Issue, provides that

(*h*) Co. Litt. 295 b.

upon the determination of these Estates, a term of 1,000 years shall arise for the purpose of securing certain pecuniary Legacies to be after mentioned, with which it is her intention, in that event, to charge the Estate; and, subject to such charge, she gives the Estate to her Husband in fee.

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When she comes afterwards to enumerate the legacies which she means in that event to charge upon the Estate, she expresses herself to this effect, "I give and bequeath, from and after the decease and failure of Issue of my said Daughter, the several Legacies and Sums of Money hereinafter mentioned, &c. &c." It is said these Legacies are given, not as the Term is to arise upon the determination of the Estates before limited to the Daughter and her Issue; but upon an indefinite failure of all Issue of the Daughter; and that there being no Estate before limited, which extends to all Issue of the Daughter, the period for the payment of the Legacies is too remote.

It is perfectly true, that there was no Estate before limited to the Issue female of the Sons of the Daughter, and consequently no Estate which extended to all possible Issue of the Daughter; and that taking the expression literally the Legacies are too remote.

That the literal force of the expressions here is not according to the real intention of this Testatrix admits of no doubt; and the question is, whether upon the whole of this Will there is sufficient evidence of intention to warrant the Court in holding that when this Testatrix used the expression, "from and after the failure of Issue of my said Daughter," she must be un-

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derstood to mean Issue of my said Daughter as aforesaid. All Courts in the construction of Wills are in the constant habit of supplying such, and larger words, where the context of the whole Will requires it.

In the first place, the Term is to arise upon the determination of the Estates limited, for no other purpose than the payment of Legacies thereafter given; and it is irrational to say that the Testatrix did not intend that the Term and the purpose should meet.

In the next place, the directions as to the raising of these Legacies import, not a future contingency which is to determine whether the Legacies are or not to be raised, but a certain and immediate purpose to raise the Legacies in question by the usual means at the commencement of the Term.

This Testatrix, therefore, having upon failure of particular Issue of her Daughter created a Term for the sole purpose of paying certain Legacies after mentioned in her Will, and having, further, used expressions which import that those Legacies are then immediately to be paid when the Term arises, when she afterwards speaks of the Legacies which are to be paid upon failure of Issue of her Daughter, she must be understood as speaking of those Legacies for which she had before provided, and which were to be payable upon the failure of particular Issue of her Daughter, and the two clauses are to be rendered consistent by supplying the sense of Issue aforesaid.

I think this course of reasoning would be satisfactory to every mind, if it might not be conjectured that it was

by mistake that there was no limitation to the Daughters of the Sons, and that the Testatrix, therefore, truly intended that the Legacies should only be payable upon a general failure of Issue of Lady *Ormonde*. I will not say that this is an extravagant conjecture, but considering it cannot justly be stated higher than conjecture, and that it is not therefore to be relied upon as the foundation of judicial opinion, I am best satisfied with my first conclusion.

With this opinion it becomes unnecessary for me to refer to the question of confirmation by Lady *Ormond's* Will.

The Decree was thus :

“ This Court doth declare, that the Legacy of 5,000*l.* given and bequeathed by the Will of *S. P. Clarke*, the Testatrix, in the Pleadings named to the Plaintiff, and the Legacy of 20,000*l.* thereby given and bequeathed to the Children of *Catherine Watson* in the Pleadings named, and the several other Legacies charged by the said Will and Reversion therein mentioned, are well charged upon the Estates, Hereditaments and Premises, comprised in the Term of 1,000 Years thereby created.

“ And this Court doth Order and Decree, that it be referred to Mr. \_\_\_\_\_ one, &c. to take an Account of what is due for Principal and Interest, in respect of each of the said Legacies, and to tax the Costs of the Plaintiffs and Defendants of this Suit ; and unless the Defendants, the Marquis of *Ormonde*, *E. S. C. Pole*, *H. R. C. Pole*, and *G. F. C. Pole*, or any or either of them, shall, within Six Months after the *Master* shall have made the Report, pay unto the Plaintiffs and

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Defendants, the Legatees, the Principal and Interest due in respect of their Legacies, and the said Costs of this Suit, It is Ordered, that what the said *Master* shall find due for Principal and Interest, in respect of the said Legacies, and the Amount of the said Costs when taxed, be raised by Sale or Mortgage of the said Estates, Hereditaments and Premises, or of a sufficient part thereof, for the remainder of the said Term of 1,000 Years, with the approbation of the said *Master*, and as he shall direct. And in case the same shall be raised by Sale, such Sale is to be to the best Purchaser or Purchasers that can be got for the same, to be allowed of by the said *Master*: and it is Ordered, that all proper Parties do join in such Mortgage or Sale, and produce before the said *Master*, upon oath, all Deeds and Writings in their custody or power relating to the said Estates, as the said *Master* shall direct; and in case the said Legacies, Interest and Costs, shall be raised by Mortgage, then it is Ordered, that the Tenant for Life of the said Estates, Hereditaments and Premises, do keep down the Interest of the said Mortgage out of the Rents and Profits thereof. And it is Ordered, the Money to arise by the said Sale or Mortgage be paid into the Bank, with the privity of the Accountant-General of this Court, to be there placed to the credit of this Cause; and the same, when so paid into the Bank, is to be applied in Payment of what the said *Master* shall find due for Principal and Interest in respect of the said Legacies, and of the said Costs; and for the better taking of the said Accounts the Parties are to produce before the said *Master*, upon oath, all Books, Papers and Writings in their custody or power relating thereto, and are to be examined upon interrogatories as the *Master* shall

direct, who, in taking the said Accounts, is to make unto the Parties all just Allowance. And this Court doth reserve the consideration of all further Directions until after the said *Master* shall have made his Report, and the said Sale shall be had; and any of the Parties are to be at liberty to apply to this Court as there shall be occasion.

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“ And this Decree is to be binding on the Defendant, *Gorman Francis Chandos Pole*, the Infant, unless he, on being served with a Subpœna to show Cause against the same, shall within six Months after he shall attain his Age of twenty-one years show unto this Court good Cause to the contrary.”

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EBRINGTON v. EBRINGTON.

17th July.

IN this Case an Infant was put to his election, whether he would take under the Will, or against it; and the *Vice-Chancellor* referred it to a *Master*, to inquire whether it would be most for the benefit of the Infant to elect to take under the Will, or against it (a).

*Infant put to an election under a Will; and a Reference to the Master to ascertain what election would be most to his Benefit.*

(a) A Similar Order was made in *Wilson v. Lord John Townshend*, 2 Ves. 697.

ALICE EADE EADE - Plaintiff,  
and  
WILLIAM J. EADE, THOMAS BODLEY, MARGARET-SUSANNA NORTON, MARY-ANNE NORTON, ELIZABETH NORTON, and GEORGE EADE and WILLIAM EADE - Defendants.

1820.

18th July.

*Bequest of Residue to Testator's Wife, "requesting she would, at her death, leave 200l. to each of the Miss Nortons, and leave the Remainder of her Property to my Nephews G. and Wm. Eade."*

*It was referred to the Master to inquire who were the Persons meant by the Miss Nortons; and on his Report, and on further Directions, the Legacies were secured to the three Persons proved to have been intended by the*

*Testator; but the Testator's Wife was held absolutely entitled to the Remainder of the Property, in exclusion of the Claims of G. and Wm. Eade.*

THE Will of *George Eade*, 14th June, 1814, was thus: "I direct that all my just Debts and Funeral Expenses may be paid. I give all the remainder of my Effects, Cash, Goods, Plate, Books, &c. of every description, to my Wife, *Alice Eade Eade*, (the Plaintiff,) requesting that she will at her Death leave 200l. to each of the *Miss Nortons*, and leave the remainder of her Property to my Nephews, *George and William Eade*, in such proportions as she thinks proper. I request, as a favour, that my Brother *Jonathan Eade* and Mr. *Thomas Bodley*, will act with her as joint Executors to this my last Will and Testament."

*Alice Eade Eade* filed her Bill, claiming to be absolutely entitled to the clear residue of the Testator's personal Estate, after payment of his Debts, Funeral and Testamentary Expenses.

The questions made were, Whether the Defendants, *Susanna Norton, Anne Norton, and Elizabeth Norton*, were respectively entitled, as a vested Interest in them, to 200l. on the death of the Plaintiff? and whether *George Eade and William Eade* were entitled to the

remainder of the Testator's Property, after the death of the Plaintiff; or whether the Plaintiff was entitled to the Property absolutely?

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EADZ

v.

EADZ

and others.

On the Hearing of the Cause on the 11th March, 1820, it was referred to the *Master* to inquire who were the Persons meant in the Will of the Testator, by the description of the *Miss Nortons*.

The *Master*, by his Report, 31st May, 1820, stated, that he found by the Affidavit of *Walter Elty*, of, &c. that he was intimately acquainted with and well knew the Testator for more than 20 years, previous and up to his death, and that he was acquainted with and knew the connections of the Testator; and that the Testator was many years in partnership with *Benjamin Norton*, (who died in the life-time of the Testator,) in the business of a Tea-dealer; and that after the death of the said *Benjamin Norton*, the Testator continued the partnership with *Samuel Norton*, his Son, until the Testator's death; and that *Benjamin Norton* left three Daughters, *Margaret-Susanna*, *Mary-Anne*, and *Elizabeth Norton*; and he further stated, that he did not know any Persons of the Name of *Norton* who were connected with the Testator, other than the Family before mentioned; and he verily believed that the Persons meant and mentioned in the Testator's Will by the description of the *Miss Nortons* were the Defendants, *Margaret-Susanna*, *Mary-Anne*, and *Elizabeth Norton*, the only Daughters of the said *Benjamin Norton*. And upon consideration of the matter, the *Master* was of opinion that they were the Persons meant in the Testator's Will by the description of "the *Miss Nortons*."



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EADE  
v.  
EADE  
and others.

The Cause now came on upon further Directions.

Mr. *Heald*, and Mr. *Phillimore*, for the Plaintiff:—

The Widow takes absolutely, or at least subject only to the payment of 200*l.* at her death to each of the Miss *Nortons*. The words of request by the Testator that she would leave the remainder of her Property to his Nephews *George* and *William Eade*, do not raise a Trust in their favour; for as she may augment or diminish her Property in a hundred ways, it is wholly uncertain of what her Property may consist at the time of her death (*a*). How are the Nephews to take? suppose one dies, is his Representative entitled? If she makes no appointment, are they to take equally? No Case has determined that.

Mr. *Bell*, and Mr. *Daniell*, for the Defendant,  
*Bodley*, and the Miss *Nortons*.

Mr. *Horne*, and Mr. *Shadwell*, for the Defendants,  
*George* and *William Eade*:—

The Miss *Nortons* are clearly entitled to the 200*l.* each, as reported by the *Master*, and the gift by the Testator, “of the remainder of her Property to my Nephews, *George* and *William Eade*, in such proportions as she thinks proper,” means the remainder of his Property, after deducting the Legacies of 200*l.* each to the Miss *Nortons*. Read with the context of the Will he must mean to speak of the Property he had left to his Wife, and not as to that which she might acquire, over which he had no dominion. This is the only way of giving effect to the words of the Will. The request

(*a*) See the cases on this subject, 2 Madd. Prin. and Pract. p. 6 to 8, 2d edit.

created a Trust, and if she executes ~~no~~ Appointment they will take equally.

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and others.

The VICE-CHANCELLOR:—

A request or recommendation will raise a Trust, if the objects and the Property are described with such certainty that the Court can execute it. The Defendants, the Miss *Nortons*, are plainly entitled to the Legacies of 200*l.* each; and if the Testator had requested his Wife at her death to leave the remainder of his Property to *George* and *William Eade*, there would have been a clear Trust in their favour, because the remainder of the Testator's Property could have been ascertained. I cannot say, that by the remainder of *her* Property at her death, he meant the remainder of *his* Property. It must be understood to mean such Property as she happened to possess at her death, from whatever source derived.

This Testator having therefore, in effect, left his Wife at liberty to deal with the remainder of his Estate as she pleased, his request as to the uncertain Property of which she might be possessed at her death, cannot create a Trust.




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PUNDERSON v. DIXON.

20th July.

BY the Decree in this Cause it was directed, amongst other things, that "the Parties should produce, before the *Master* all Books, Papers, &c."

*The Decree being, amongst other things, that "the Parties*

*should produce before the Master all Books, Papers, &c.;" the words, as the Master shall direct," were added on a Motion for that purpose.*

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DIXON.

Mr. *Heald* now moved to vary the Minutes, by the addition to the Order for the production of Books, &c. the words, “as the *Master* shall direct;” observing, that it would be more convenient.

Mr. *Bell, contra*, observed, those words were not usual.

The *Vice-Chancellor*, after consulting with the *Registrar*, stated, that these words were usual, and were important, in order to vest the *Master* with a discretion upon the subject of production.

Motion granted.

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#### WARD v. COOKE.

21st July.

*Multifariousness in a Bill cannot be objected to on the hearing of the Cause.*

WHEN this Cause came on, Mr. *Owen* objected that the Bill was multifarious, but the *Vice-Chancellor* held, that if a Bill be multifarious it should be objected to by Demurrer, and that it is too late to make that objection on the Hearing of the Cause.

SURMAN v. SURMAN.

1820

22d July.

THE Question in this Cause was as to the Construction of the following Bequest; "And as to my Household Goods, Stock in Trade, Book Debts, Monies, and all other personal Estate that I shall die possessed of, after and subject to the Payment of my just Debts, Funeral and Testamentary Expenses, I give and bequeath the same to my said Wife, for her Life, or Widowhood, with power for her to use, apply, employ, and appropriate the same as she thinks proper, for her own Benefit, and the proper maintenance of my said Nephew and Daughter-in-Law during their respective minorities; and upon her decease, or second Marriage, I give and bequeath the same, or so much as shall then remain, unto my said Nephew, *Henry Surman*, and my Daughter-in-Law, *Mary Handy*, equally, Share and Share alike; and my Will is, that my Wife shall maintain and provide Clothes, and educate my said Nephew, and permit him to reside with her so long as he shall behave himself properly, and be sober and diligent, to the satisfaction of my Trustees; and I request them to advise with and assist my Wife in the Management of my Affairs, and give them 5*l.* each for the trouble they will have therein; and I appoint my said Wife sole Executrix.

*Bequest of Household Goods, &c. after Payment of Debts, &c. to Testator's Wife for her Life, or Widowhood, with Power to her to sell the same, as she should think proper, for her own Benefit and the Maintenance of Testator's Nephew and Daughter-in-law, during their Minority, with a Bequest over, upon the Death, or second Marriage of the Wife, of the same, or so much as should then remain to such Nephew and Daughter-in-law. Held, that the Widow was*

Mr. Trower, and Mr. —, for the Plaintiffs.

*entitled to the Residue for her Life, or Widowhood, with a Power to apply any Part of the Capital for her own Benefit and the proper Maintenance of the Nephew and Daughter-in-law during their Minorities; and that on the Death or Marriage of the Widow, the Remainder of the Capital unapplied was well limited over.*

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SURMAN.

Mr. *Bell*, and Mr. *Girdlestone*, for the Defendant,  
the Executrix.

The *Vice-Chancellor* was of opinion that the Widow was entitled to the Inheritance for her Life, or Widowhood, with a power to apply any part of the Capital for her own Benefit, and the proper maintenance of her Nephew and Daughter-in-Law during their respective minorities; and that in case of the second Marriage, or on the death of the Widow, the remainder of the Capital unapplied was well limited to the Nephew and Daughter-in-Law.

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*Ex parte* BOEHM and another, *in re* BENNETT,  
an Infant.

4th August.

*Tenant in Tail, with Remainders over by Bargain and Sale, conveyed to B. for the purpose of making him Tenant to the Precipe in a Recovery. By a mistake, the Recovery was suffered before the Bargain and Sale was executed.*

*The Tenant in Tail died. Held that the Infant Heir of B. was not a Trustee under the Statute of 7th Anne, c. 19.*

THIS was a Cause Petition; and it stated, that by an Order 12th June 1820, a reference was made to a *Master* to certify how the Estate therein mentioned was vested in *A. M. Bennett*; and whether he was an Infant, Mortgagee or Trustee, within 7th *Anne*, c. 19, and for whom. The *Master*, by his Report, in substance stated, that by Bargain and Sale, 6th June 1793, between *Roger Boehm* of the first part, *Thomas Bennett*, of, &c. of the second part, and *Henry Gibbs*, of the third part; the said *Roger Boehm*, granted, &c. unto said *Thomas Bennett*, his Heirs and Assigns, *inter alia*, the Manor or Lordship of *Sunbury*, with the Rights, &c. and also several Messuages or Tenements, pieces or parcels of Arable Land, Meadow and Pasture, situate, &c. at *Sunbury* aforesaid, &c. and also a Messuage, &c. situate in *Bishopsgate*

*Street*, in the City of *London*, and also Eight Messuages or Tenements, situate in *Bishopsgate Street*, &c. and in the Parish of *St. Peter, Cornhill, London*, &c. with their and every of their Appurtenances, To hold to the use of said *Thomas Bennett*, his Heirs and Assigns, for ever; to the intent that he might become Tenant of the Freehold of the said Premises, to the end that Three or more common Recoveries might be suffered of the Premises thereby granted, bargained and sold, as therein mentioned. And it was thereby declared and agreed that the said Recoveries, and all other Recoveries, Fines, Conveyances and Assurances theretofore made, levied, suffered or executed, or thereafter to be had made, levied, suffered or executed of the said Premises, should be and enure to the use and behoof of the said *Roger Boehm*, his Heirs and Assigns, for ever, and to and for no other use, intent or purpose whatsoever. And he found the said Indenture was enrolled in the Court of *Common Pleas* as of *Trinity Term* in the 33d Year of *George III.* and registered the 31st day of *March 1794*; and he found that in the said *Trinity Term* two Recoveries of the said Manor and Premises were duly suffered in pursuance of the said Indenture, wherein the said *Henry Gibbs* was Demandant, the said *Thomas Bennett*, Tenant, and the said *Roger Boehm* Vouchee; and he found, that by Indentures of Lease and Release, 4th and 5th days of *February 1794*, the Release made between the said *Roger Boehm*, of the one part, and *Dorothy Serle*, of the other part, he, the said *Roger Boehm*, for the considerations therein mentioned, granted unto the said *Dorothy Serle*, and her Heirs, all that the said Manor or Lordship of *Sunbury*, with the Rights, &c. and the Messuages or Tenements in *Bishopsgate Street*, and other the Premises therein

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and herein before mentioned, together with the Rights, &c. and all other the Hereditaments and Premises whatsoever, with the Appurtenances, then late of *Vansittart Hudson*, deceased, wherein the said *Roger Boehm* was seised of any Estate of Freehold or Inheritance in possession, situate in the Counties of *Middlesex* and *Hertford*, or in the City of *London*, and all the Estate, &c. of him the said *Roger Boehm* therein, To hold unto the said *Dorothy Serle* and her Heirs, to the use of him the said *Roger Boehm*, and the Heirs Male of his Body, with divers Remainders over as therein mentioned, and with such Powers of Leasing as therein also mentioned; and he found, that by Indenture of Bargain and Sale, bearing Date the 6th day of February 1794, and made between the said *Roger Boehm*, of the first part, the said *Thomas Bennett*, of the second part, and the said *Harry Gibbs*, of the third part, he, the said *Roger Boehm*, granted, &c. unto the said *Thomas Bennett*, his Heirs and Assigns, *inter alia*, all those the said Manor, Messuages, Hereditaments and Premises, with their Appurtenances situate at *Sunbury*, and *Bishopsgate Street* aforesaid, To hold to the said *Thomas Bennett*, his Heirs and Assigns, to the use and behoof of him the said *Thomas Bennett*, his Heirs and Assigns for ever, to the intent that the said *Thomas Bennett* might become a good and perfect Tenant of the Freehold of the said Manor and Hereditaments, to the end that one or more common Recoveries might be thereof suffered in the manner and at or before the times therein expressed: And in and by the said Indenture it was declared and agreed, by and between the said Parties thereto, that the said common Recovery or Recoveries so to be suffered, and the said Indenture of Bargain and Sale, and all other Recoveries, Convey-

ances and Assurances theretofore or thereafter to be levied, suffered or executed of the said Manor, Messuages and Hereditaments, should be and enure, and the Recoveror and Recoverors in the said Recoveries named or to be named, and his and their Heirs, should stand and be seised of the said Manor, &c. To the use and behoof of the said *Roger Boehm*, his Heirs and Assigns for ever. And he found that in *Hilary Term*, in the 34th of *George III.* two Recoveries were suffered in pursuance with the last-mentioned Indenture of Bargain and Sale, wherein the said *Henry Gibbs* was the Demandant, the said *Thomas Bennett*, Tenant, and the said *Roger Boehm*, Vouchee of the said Manor of *Sunbury*, Messuages and Hereditaments before mentioned, and the said *Roger Boehm* vouched the common Vouchee. And he found, that by the Record of the said Recoveries it appeared that the same Recoveries were completed, and suffered before the said Indentures of the 4th and 5th days of February 1794, or the said Indenture of Bargain and Sale of the 6th February 1794, or either of them, were or was respectively executed, so that the second Estate-Tail of the said *Roger Boehm* was created after the second Recovery, and was not barred by the operation of that Recovery; and he found that the said *Roger Boehm* did, in his life-time, make a will, bearing date the 24th day of March 1801, and which, amongst other provisions, was in the words following, that is to say, "I Give and Bequeath all the rest and residue of my Fortune to my Trustees aforesaid, in Trust, to pay the Income arising therefrom to my Brother *Edmund Boehm*, Esquire, meaning thereby the said *Edmund Boehm*, for his use during his Life, with Remainder, in default of Issue, to *Clement Boehm*, Esquire, during his Life, with Limitations over. And

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he found that the said Manor of *Sunbury*, Messuages, Hereditaments and Premises hereinbefore mentioned, were all comprised in the residue of the said Testator's Estate so as aforesaid given to or in Trust for the said *Edmund Boehm* by the said Will. And he found that *Thomas Clarke* and *Henry Gibbs*, in the said Will described, were the Trustees in the said Will named. And he found that the said *Roger Boehm* died on or about the — day of July, 1803, without Issue male. And he found, that by Indenture of Bargain and Sale, bearing Date the 20th day of June 1804, and made between the Petitioner, *Edmund Boehm*, therein described as the only Brother and Heir, and also a Devisee in the last Will and Testament of the said *Roger Boehm*, deceased, of the first part; the said *Henry Gibbs*, of the second part; and *Charles Gibbs*, therein described, of the third part; the said *Edmund Boehm* granted, &c. unto the said *Henry Gibbs*, his Heirs and Assigns, amongst others, all the aforesaid Manor of *Sunbury*, and the said Hereditaments and Premises in the Parish of *Sunbury* aforesaid, with the Appurtenances, and also Six of the said Messuages or Tenements in *Bishopsgate Street*, aforesaid, by the description of all that capital Messuage, &c., and also all those Five Messuages or Tenements situate and being in *Bishopsgate Street* aforesaid, in the said Parish of *St. Martin Outwich*, and the Parish of *St. Peter, Cornhill*, in the said City of *London*, or in one of them, of, &c., with their Appurtenances, to hold unto and to the use of the said *Henry Gibbs*, his Heirs and Assigns for ever, to the intent that he might become Tenant of the Freehold of the said Premises, to the end that Three or more common Recoveries might be suffered of the said Premises, and of other Premises thereby

granted, &c.; and it was thereby declared and agreed that such Recoveries, and all other Recoveries, Fines, Conveyances and Assurances theretofore made, levied, suffered or executed, or thereafter to be had, made, levied, suffered or executed of the said Premises, should be and enure to the use and behoof of the Petitioner *Edmund Boehm*, his Heirs and Assigns for ever, and to and for no other Use, Trust, intent or purpose whatsoever:—And he found, that in *Trinity* Term, in the 44th year of *Geo. 3*, two Recoveries of the said Manor and Premises were duly suffered, in pursuance of the said last-mentioned Indenture of the 20th day of June 1804:—And he found, that, by a Decree of this Court, 25th day of June 1804, in a Cause wherein the Petitioner, the said *Edmund Boehm*, was the Complainant, and *Clement Boehm*, Sir *John Frederick*, and others therein respectively named, were Defendants, it was, amongst other things, declared, that the Petitioner *Edmund Boehm*, under and by virtue of the Will of *Roger Boehm*, took at least an Estate-Tail in the said Estates of the said Testator, subject to the payment of the several Annuities charged thereon by his said Will; and that Petitioner *Edmund Boehm* was also entitled to the clear residue of the personal Estate of the said Testator, after payment of his Debts, and the several Legacies and Annuities given by his Will; and it being therein admitted, that the said *Edmund Boehm* had suffered common Recoveries of the said Testator's real Estate, it was ordered, that the Defendants, *Thomas Clarke* and the said *Henry Gibbs*, should convey such real Estates to the said *Edmund Boehm* and his Heirs, or as he should appoint, subject nevertheless to and charged with the payment of the several Annuities:—And he found, that by certain Inden-

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tures of Lease and Release, 13th and 15th days of February 1819, the Release made between the said *Edmund Boehm*, of the one part, *John Thornton* and the Petitioner *Robert Berney*, therein respectively described, of the other part; after reciting, amongst other things, that the said *Edmund Boehm* was seised of or entitled to the aforesaid Manor and Premises, and that he was desirous of converting the same into Money, and that the said *John Thornton* and *Robert Berney* were willing to assist him in that object, on being indemnified as therein mentioned; it was witnessed, that for the purpose of carrying such desire into effect, so far as the same related to the said Freehold Hereditaments and Premises, and in consideration of 10s. by the said *John Thornton* and *Robert Berney* paid to the said *Edmund Boehm*, as therein mentioned, he the said *Edmund Boehm* did grant, &c. unto the said *John Thornton* and *Robert Berney*, in their actual possession then being, as therein mentioned, and to their Heirs, amongst others, all that the said Manor of *Sunbury*, with the Rights, &c. and the said Messuages or Tenements in *Bishopsgate*, and other the Hereditaments and Premises therein and thereinbefore mentioned; to hold unto and to the use of the said *John Thornton* and *Robert Berney*, their Heirs and Assigns for ever, upon the Trusts thereafter declared, of and concerning the same; and in the said Indenture of Release was contained a Declaration and Agreement, that the said *John Thornton* and *Robert Berney*, their Heirs, Executors, Administrators and Assigns, should stand and be seised of the said Manors, Messuages, Lands, Titles, Hereditaments and Premises, with their Appurtenances, upon Trust, that they the said Trustees, or the Survivors or Survivor of them, or the Executors, Admini-

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strators and Assigns of such Survivor, should forthwith, and at such time or times as they or he in their or his discretion might think fit, absolutely sell and dispose of the same Manors, &c. in manner therein mentioned; and in the mean time, and until such Sale, did and should raise, by Mortgage of all or any part of the same Freehold, Copyhold and Leasehold Hereditaments therein mentioned, such sum or sums of Money as therein mentioned; and the said *Edmund Boehm*, the Petitioner, was the only Person interested under the said Trusts:—And he found, that by Indenture of three parts, duly executed, (indorsed on the said Indenture of Release of the 15th day of February 1819,) bearing date the 26th day of June, 1819, and made between the said *John Thornton*, of the first part, the Petitioner *Edmund Boehm*, of the second part, and the Petitioner *Robert Berney*, of the third part, after reciting, among other things, that no act had been done, or Money raised, by the said *John Thornton* and the Petitioner *Robert Berney*, in the execution or performance, of all or any of the aforesaid Trusts, and that the said *John Thornton* was desirous of relinquishing the Trusts so as aforesaid reposed in him, and of being discharged from the said Trusts; and that the Petitioner *Edmund Boehm* was desirous and consenting that all the Estate and Interest of the said *John Thornton*, under the said Indenture of Release, should be released or conveyed to and vested in the Petitioner *Robert Berney* alone, upon the same Trusts, ends, intents and purposes as the same were then invested in the said *John Thornton*, jointly with the Petitioner *Robert Berney*; it is witnessed, that in pursuance of the said Agreement, and for a nominal consideration, he the said *John Thornton*, at the instance and request, and by the direction and appointment of the Petitioner the said *Edmund Boehm*,

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and on the acceptance of the Petitioner *Robert Berney*, testified as therein mentioned, did remise, release and confirm to the Petitioner, *Robert Berney*, his Heirs and Assigns, all that Part or Share, Estate and Interest of the said *John Thornton*, of and in all the said Freehold Manors, &c. to hold unto and to the use of the Petitioner *Robert Berney*, his Heirs and Assigns for ever, upon the Trusts thereafter declared; and it was directed, declared and agreed, that the Petitioner *Robert Berney*, his Heirs, Executors, Administrators and Assigns, should thenceforth be seised of the said Freehold Manors, Messuages, Farms, Lands, Tithes and Hereditaments, upon the Trusts, and for the ends, intents and purposes, and subject to the Powers, Provisions and Agreements declared by the said Indenture of Release of the 15th day of February 1819, in like manner as if he had been thereby appointed the sole Trustee, and the name of the Petitioner *Robert Berney*, alone, and his Heirs, Executors, Administrators and Assigns, had in the said Indenture of Release been inserted in the place and stead of the said Names of the said *John Thornton*, and the Petitioner *Robert Berney*, and of their Heirs, Executors, Administrators and Assigns, and the said Manors and Hereditaments had been thereby conveyed and assured unto the Petitioner *Robert Berney* alone, his Heirs, Executors, Administrators and Assigns, and the Trusts, Powers and Authorities which by the said Indenture were given or limited to or reposed in the said *John Thornton*, and the Petitioner *Robert Berney*, their Heirs, Executors, Administrators and Assigns, or the said *John Thornton* and the Petitioner *Robert Berney*, or the Survivor of them, his Heirs, Executors, Administrators and Assigns, had, by the said Indenture, been limited, or given to or reposed in the Petitioner *Robert*

*Berney*, his Heirs, Executors, Administrators and Assigns :—And he found, that the said *Robert Berney*, in pursuance and performance of the Trusts of the last-mentioned Indenture, had sold and conveyed part of the said Premises, and had been willing and desirous to enter into a valid Contract for the Sale of the remainder of the said Manors, &c. but that some objections had been raised to the Title of the Petitioners to the said Manors, &c. as derived under the said Recoveries, by reason that the Estate and Interest of the said *Roger Boehm*, deceased, of and in the said Manor or Lordship of *Sunbury*, and the Messuages or Tenements, Hereditaments and Premises thereinbefore in that behalf mentioned and described, whereby the force and operation of the aforesaid Indenture of Bargain and Sale of the 6th day of February, 1794, divested out of the said *Roger Boehm*, and vested in the said *Thomas Bennett*, his Heirs and Assigns, at the time of his decease, as next hereinafter mentioned, and that the legal Freehold was not in the said *Edmund Boehm*, the Petitioner, at the date and execution of his Conveyance to the said *Henry Gibbs*, but in the said *Thomas Bennett*, as sole Bargainee as aforesaid, or in his Heir at Law :—And he found, that the said *Thomas Bennett* departed this life on or about the 1st day of June 1802, without having devised his Trust Estates, leaving *Alexander Bennett*, his only Brother and Heir at Law, who departed this life on or about the 28th day of September 1819, without having devised his Trust Estates, leaving *Alexander Morden Bennett*, an Infant under the age of twenty-one years, his Heir at Law :—And he found, that under the circumstances, *Alexander Morden Bennett* was not an Infant Trustee of the said Manor, Hereditaments and Premises, within the intent and meaning of the Act of *Anne*. The Pctition then

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submitted, that the Report was founded on a mistake of Law, and was not warranted by the Facts and Charges stated in the said Report, and prayed that it might be referred to the said *Master* to review his said Report, or that, on the Facts and Circumstances stated in the said Report, it might be declared and ordered that the said *Alexander Morton Bennett* is a Trustee within the true intent and meaning of the said Act, and that it might be ordered that he should execute a Conveyance of the said Estates mentioned in the said Petition, agreeably to the Prayer of the same Petition, or in such other manner as should be thought meet.

Mr. *Shadwell*, and Mr. *Boteler*, in support of the Petition :—

The Recovery in 1794, by *Roger Boehm*, then Tenant in Tail, with Remainder to the Petitioner *Edmund Boehm*, was by some mistake suffered before the execution of the Bargain and Sale on the 6th February 1794, to *Bennett*; before, therefore, any Tenant to the *Præcipe* was created, and consequently the Recovery was of no effect; and the Bargain and Sale to *Bennett* being executed after the Recovery suffered, the Estate of the Bargainee continued in him, notwithstanding *Roger Boehm* died without Issue, and the Recovery suffered by *Edmund Boehm* was therefore of no avail; but *Edmund Boehm* taking under the Remainder to him on the death of *Roger Boehm* without Issue, he is entitled to call for a Conveyance from *Bennett*, and then another Recovery must be suffered by *Edmund Boehm*, in order to give a complete Title to this Purchaser. The Statute *de Donis* made no alteration in the Estate of a Tenant in Tail, but only rendered his Conveyance of the Fee voidable, defeasible by the Issue, or those in Remainder. In *Machil v.*

*Clark (a)*, Chief Justice *Holt* says, "1st. If Tenant in Tail covenants to stand seised, or by Lease and Release, or Bargain and Sale, conveys to another and his Heirs, it is a base Fee, not determined, nor determinable, till the entry of the Issue; for before the Statute *de Donis*, he had a Fee-simple, and the Statute does not alter the nature of the Estate, but restrains the power of alienation; and therefore as he might before the Statute, so he may since; the Statute only makes it voidable.—2dly. He has the whole Estate in him, and therefore must be able to divest it, and so he said was *Seymour's Case* in point, viz. Tenant in Tail bargained and sold, the Bargainee has a descendible Fee. This Case held for Law, but denied the Case of *Took v. Glasgow (b)*, and likewise *Littleton (c)*, if it be taken literally." In an Opinion of the late Mr. *Fearne*, on the 20th March 1783, he says, "It seems to have been believed ever since the Decision in *Symonds v. Cudmore*, (he means *Machil v. Clark (d)*), however doubtful before, that a Bargain and Sale by Tenant in Tail gives the Bargainee a descendible Fee; this it does without discontinuing the Estate Tail, or barring either the Issue or Remainder-man: it only passes the legal Estate, not so as to bind the Issue or Remainder-man, but so as to be voidable by the Issue or Remainder-man, and which Estate continues in the Grantee till so divested." The result is, therefore, that the Conveyance by Bargain and Sale to *Bennett* gave him an Estate, which continues in him. If *Edmund Boehm* entered to oust *Bennett*, that would have regained him the Estate, but he entered as *Cestui*

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*BOEHM*  
and another  
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(a) 2 Salk. 619. S. C. 2 Ld.

(c) S. 612.

Raym. 778, & Farresley 18.

(d) 2 Salk. 619.

(b) 1 Saund. 260.



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*Ex parte*  
BOEHM  
and another  
*in re*  
BENNETT.

*que Trust*; it therefore has no effect, and *Bennett's* Heirs must now convey; and as the Heir at Law is an Infant, he may, under the Statute, be directed to convey; and the *Master's* Report, of consequence, is incorrect.

Mr. Preston, *contra* :—

When *Roger Boehm* died without Issue Male, and his Estate-Tail Male thereby determined, the Estate of his Bargainee, *Bennett*, determined also, and the Recovery suffered by *Edmund Boehm* after the death of *Roger Boehm*, barred *Edmund's* Estate-Tail, whether that Estate-Tail existed under the Deeds of 1794, or under the Will of *Roger Boehm* his Brother. A Bargain and Sale cannot divest any Estate. No man can give what he has not. When he makes a Grant, he can pass only what he has. The *Bargain and Sale* passes a base Fee only, and according to the Maxim, *cessante statu primitivo cessat et derivativus*, the Estate of the Bargainee determined on the death of the Tenant in Tail without Issue. The Bargain and Sale conveyed a base Fee, that is, where a Remainder or Reversion is behind it. After the Statute *de Donis*, a Remainder or Reversion after an Estate-Tail gave a seisin *instante*, and the moment *Roger Boehm* died without Issue, the Remainder went to *Edmund Boehm*, and the Estate in the Bargainee ceased. *Littleton* (c), thought that the Estate of the Bargainee determined with the death of the Tenant in Tail; and in *Cook v. Glasgow* the same error prevailed, but it was afterwards corrected in the Case referred to on the other side, of *Machil v. Clarke*, and that the Bargainee's Estate ceased only on the death of the Tenant in Tail without Issue. *Seymour's*

(c) S. 612.

Case (f) is to the same effect, as is also *Shepherd's Touchstone*. A Tenant in Tail may rightfully grant a base Fee, nor does the Grant discontinue a Reversion or Remainder. After the Statute *de Donis* the Tenant in Tail had a particular Estate only, and the Reversion or Remainder became an actual Estate, and being an Estate it must commence in possession when the particular Estate-Tail determines; the language of Mr. *Fearne* is correct only when applied to the state of a Title, while there is a continuance of Issue; on the failure of Issue the Estate is actually determined. What Estate then has *Bennett*? None. The Recovery suffered by *Edmund Boehm* was valid. The *Master's* Report, therefore, is correct.

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BOEHM  
and another  
*in re*  
BENNETT.

The VICE-CHANCELLOR:—

The Bargain and Sale to *Bennett* passed a base Fee, determinable upon failure of Issue of *Roger Boehm*, but did not divest the Remainder to *Edmund Boehm*. Upon the death of *Roger Boehm* without Issue, all Estate in *Bennett* ceased, and the Remainder to *Edmund*, vested in possession; and the Recovery suffered by *Edmund Boehm*, with intent to bar a supposed equitable Estate-Tail under *Roger Boehm's* Will, will bar his actual legal Estate-Tail. The *Master* has, therefore, correctly found that the Infant Heir of *Bennett* is not a Trustee within the Statute.

Let the Report be confirmed (h).

(f) 3 Rep. 84.

(h) The Cases, and the distinctions on this subject, are pointed out by Mr. Butler,

with his usual learning and discrimination, in his note to Co. Litt. 331 a, n. 1.

MARY SALVIDGE, (Widow of JAMES SALVIDGE, deceased,) ANNE SALVIDGE, otherwise ANNE YORK, Spinster, an Infant under the age of ten Years, or thereabouts, by MARY SALVIDGE, her Mother and next Friend, JAMES CLARKE, and BENJAMIN CHESTER, on behalf of themselves, and all other the Creditors of the said JAMES SALVIDGE, who shall come in and contribute to the Expences of the Suit, - Plaintiffs,

and

JAMES HYDE, THOMAS HYDE, JOHN CULIFORD, PETER LAYING, THOMAS STOCK, and WILLIAM TURNER, - - Defendants.

1820.

7th August.

*Bill by Creditor against Executor and Trustee and Mortgagors in possession, for an Account, and also against one of several Purchasers in distinct Lots of an Estate, from the Executor and Trustee, impeaching such Purchase, held not to be demurrable to, by such Purchaser, for multifariousness.*

THE Bill stated, that *James Salvidge* (deceased) was entitled, under several Leases granted to him by the Prebendary of *Litton*, in the County of *Somerset*, to himself and his Heirs, during the Lives of certain Persons, to divers Freehold and Copyhold Lands at *Litton*, part of which Freehold Lands were subject to a Mortgage for 1,000*l.* made by *Salvidge* to one *Thomas Stock*; and part of which Copyhold Lands were also subject to a Mortgage for 1,000*l.* made by *Salvidge*, and which had become vested in one *William Turner*; and other part of the said Lands were mortgaged by *Salvidge* for 200*l.* and became vested in one *Thomas Hyde*:—That the said *James Salvidge*, by his Will, 10th September 1816, bequeathed to *John Culliford*, of, &c. all his Leasehold and Copyhold Lands, &c. in the Parish of *Litton*, to hold the same unto him, his Heirs, Executors, Administrators and Assigns,

according to the Tenure of the same Estates, upon Trust, to sell and convey the same to any Person and Persons willing to purchase the same, or any part or parts thereof, in such manner as he the said *John Culliford* should think proper; and upon Trust, out of the Money to arise by such Sale or Sales, to pay off all Encumbrances and Charges on the said Estates, or any part thereof, and all his the said Testator's Debts and Encumbrances affecting his personal Estate, and subject thereto, upon Trust, as for and concerning the parts of the same, if any, that should remain unsold, and the residue of the produce that should arise by sale of the same Estates, or any part thereof, for his Wife, the Plaintiff *Mary Salvidge*, and her Daughter, the Plaintiff *Anne Salvidge*, otherwise *Yorke*, their Heirs Executors, Administrators and Assigns, equally between them, during the Life of the Plaintiff, his said Wife, and from and after her decease, upon Trust, as to the whole thereof, for her said Daughter, *Anne Salvidge*, otherwise *York*, her Heirs, Executors, Administrators and Assigns; provided, and he thereby directed, that his said Wife, Plaintiff *Mary Salvidge*, should surrender, release and convey all her Right and Claim to her Widowhood Estate in all his Copyhold Tenements, when requested so to do, otherwise she should not be entitled to any benefit whatsoever under or in virtue of his said Will; and he also bequeathed all his Stock, Goods, Chattels and personal Estate whatsoever and wheresoever, unto the said *John Culliford*, in Trust for the Plaintiff his said Wife, and her said Daughter, the Plaintiff *Anne Salvidge*, otherwise *York*, during the life of Plaintiff his said Wife, equally between them; and from and immediately after the death of the

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Plaintiff his said Wife, in Trust, as to the whole thereof, for Plaintiff *Anne Salvidge*, otherwise *York*, for her sole use and benefit; and he thereby nominated and appointed the said *John Culliford* sole Executor of his Will:—That the Testator died on the 2d October 1816, and in April 1817, *Culliford* proved the Will, and the Plaintiff, *Mary Salvidge*, elected to take the provisions made by the Will, in lieu of Dower:—That in January 1817, *Culliford* caused the Estates to be advertised for Sale by Private Auction, and on the 27th of that Month, they were accordingly sold, many Persons being present at the Sale, and *Culliford* bid at the Sale for one Lot of the said Estates, containing 5 acres, which was knocked down to him, but refused to inform Petitioners of the Price at which such Lot was knocked down to him, and that he entered into Possession of such Lot, and still is in Possession, and that at such Sale some other small Lots or Parts of the said Estates were sold to other Persons:—That the Testator was one of the *Cestuis que vie* named in the Lease under which the Testator was entitled to the Copyhold Lands, but there was a Tenant right of Renewal of the said Lease, for the Term of the Lives of the *Cestuis que vie*, and of such other Person as should be named in the room of the deceased *Cestuis qui vie*, but that the Defendant *Culliford* did, at the Sale, refuse to allow the Person or Persons who might become the Purchasers of the Copyhold Lands, to name the person who should be the *Cestui que vie* in such renewed Lease, in the room of the Testator, and he insisted that his own Son should be the Person named for that purpose; and in consequence the greater part of such Copyholds were not sold or bid for:—That the Purchases have not been

completed, nor any Conveyance executed, of any of the Lots sold; and that in February and June 1817, the said Estates were again put up to Sale, but no Sale took place, and that the said Estates were again, by a few printed Hand-bills, or Advertisements, bearing date the 17th September 1817, advertised for Sale on the 25th of the same Month, but that no Advertisement was inserted in any of the Provincial Papers, and that due Notice was not given, so as to ensure a full attendance at such Sale, and that only a few Persons attended such Sale, and that some of those attended at the instance of the Defendaut *Culliford*, merely to make the appearance of an Auction; and that such Estates were bought in by the Defendant *Culliford* for 3,490*l.* and that immediately afterwards he sold the same to the Defendant *Peter Laying* for 10*l.* more than they had been bought in at:—That the sum of 3,500*l.* is an inadequate Price for the said Estates, and that if fairly sold they would fetch a much larger Sum, as the Defendant *Culliford* well knew, and that a larger Sum had been offered for such Estates:—That in January 1818 the Defendants *Stock* and *Turner*, the Mortgagees of the Estates, proceeded in Ejectment against the Plaintiff *Mary Salvidge*, to recover Possession, and sued out Execution; and on the 29th April 1819, took Possession of the Estates:—That ever since, they and *Culliford*, or some of them, have been in the Possession of the said Estates, and have committed Waste thereon by grubbing up or otherwise destroying Hedges and Fences, and ploughing up Pasture Land, cutting and selling Timber Trees of considerable value:—That the Testator, at the time of his death, was indebted to the Petitioner *Clarke* in the sum of 12*l.* and to the Petitioner *Chester* in the sum of 120*l.*:—That the Defendant *Culliford* pos-

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possessed himself of the personal Estate of the Testator to a large amount, and more than sufficient to pay his Debts, Funeral and Testamentary Expenses, but hath not applied the same in a due course of Administration, but hath wasted or converted the same, and hath not paid the Plaintiffs their Demands, and hath left other Debts to a great amount unpaid. The *Prayer* of the Bill was, that the Will might be performed and carried into execution; and that the Sales to the Defendant *Peter Laying*, and to the Defendant *John Culliford*, might be set aside; and that the Lands might be sold under the direction of the Court, and all proper Parties decreed to concur for that purpose; and that the Money produced by the Sale might be applied according to the Trusts of the Will; and that an Account might be taken in the usual manner of the personal Estate and Effects of the Testator possessed or received by the said *John Culliford*, or by any Person or Persons by his order, or for his use, or which without his wilful default might have been so received; and that the same might be applied in a due course of administration; and that an Account might be taken of what was due to the Petitioners and the other Creditors of the Testator, who should come in and contribute to the Expenses of the Suit; and that an Account might, in like manner be taken of what was due for Principal Money and Interest, in respect of the Mortgages on the said Estates and Hereditaments; and that the same might be satisfied, and that the Mortgagees might be decreed thereupon respectively to convey and to procure all proper Parties to concur in conveying the legal Estate in the said mortgaged Premises to such Person or Persons, and in such manner and form as the Court should direct; and that an Account might be taken of

the Rents and Profits of the said Estates which had been received by the Defendants respectively, or by any Person or Persons by the order or for the use of them, or of any or either of them; and that the Defendants might be decreed to pay or allow what should be found due by them respectively on taking such Accounts; and that, if necessary, a proper Person might be appointed to receive and get in the personal Estate of the Testator, and to receive the Rents and Profits of the said Estates, with the usual directions, until the same should be sold; and that the Defendants might be restrained from committing any further Waste, or cutting down any Timber now standing and growing on the said Estates.

To this Bill *Peter Laying*, one of the Defendants, demurred, as follows:

“ Doth demur thereto, and for cause of Demurrer sheweth, that it appears by the said Bill, that the same is exhibited against this Defendant and *James Hyde, John Culliford, Thomas Stock, and William Turner*, for several and distinct matters and causes, in many whereof, as appears by the said Bill, this Defendant is not in any matter interested or concerned; by reason of which distinct matters the said Plaintiff’s said Bill is drawn out to a considerable length, and this Defendant is compelled to take a Copy of the whole thereof, and by joining distinct matters together, which do not depend on each other, in the said Bill, the Pleadings, Orders and Proceedings will, in the progress of the said Suit, be intricate and prolix, and this Defendant put to unnecessary Charges in taking Copies of the same, although several parts thereof no way relate to

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or concern him, for which reason, and for divers other Errors appearing in the said Bill, this Defendant doth demur thereto, and he prays the Judgment of this Honourable Court, whether he shall be compelled to make any further or other Answer to the said Bill; and he humbly prays to be hence dismissed, with his reasonable Costs in this behalf sustained."

Mr. *Beams*, in support of the Demurrer:—

This Demurrer is sustainable on the ground of multifariousness in the Bill. The Defendant *Laying* has nothing to do with the Executorship Accounts; all he is concerned in, is as to his Purchase, which, if impeached, ought to be by a Bill singly for that purpose; he is not to be at the Expense of taking a Copy of a Bill relating to matters which do not concern him, and which may be hanging over him for many years in the taking of Executorship Accounts, in which he is not concerned. In *Brooks v. Lord Whitworth* (a), the Bill was filed against several Purchasers, and a Demurrer was allowed; and what was said in *Reyner v. Julien* (b),

(a) *Ante*, vol. i. p. 86.

(b) 2 Dick. 677. Mr. *Stuart* favoured me with the following Statement of that case from the Registrar's Book: "Bill filed by the Creditors of a Person deceased, against his personal Representative and Heir at Law, and divers other Persons, with whom the Executor had contracted to sell different parts of the Testator's real Estate, praying an Account of the personal Estate, and that

the Agreements might be specifically performed. Defendants demurred, because the Bill was multifarious; but the Master of the Rolls overruled the Demurrer, although it appeared that the Contracts were for separate parts of the Estate made with separate Persons at separate times, some by public Auction and some by private Contract." Reg. Lib. 1787, B. f. 274.

The following was the Prayer

is there relied upon. If this Defendant is a necessary Party, as being a Purchaser of part of the Testator's Estate, why were not other Purchasers, who have not completed their Purchases, made Parties? This objection for want of Parties may be taken *ore tenus*.

Mr. *Stuart*, *contra*, was stopped by

The VICE-CHANCELLOR:—

This is a Bill filed by the several Persons interested in the produce of the real and personal Estate of the Testator, against the Executor and Trustee for Sale,

of the Bill, as extracted from the Registrar's Book.

“That an Account may be taken of the Personal Estate of the said Testator, possessed by the Defendant *Humphrey Julian*; and that the same may be applied in a due course of Administration; and in case the Personal Estate of the said Testator shall not be sufficient to pay and satisfy the Plaintiff's demands, and the other Debts and Legacies of the said Testator, then that the Defendants *Humphrey Julian* and *John Culme* may proceed in the sale of the Real Estates of the said Testator, devised to them for that purpose; and that the Defendants, *George Wynne*, *John Gregg*, and *George Leach* may be decreed severally to perform their several Contracts, and to pay their Purchase

Money to the said Defendants *Humphrey Julian* and *John Culme*; and that out of the Money arising therefrom, and from the Sale of the rest of the said Testator's real Estates, or so much thereof as shall be necessary, the Plaintiffs, and the other Creditors of the said Testator who shall come in and contribute to the expenses of this Suit, may be paid their said Debts and Legacies, with Interest and Costs; and that all proper Parties may join in the Sale of the said Real Estates as this Honourable Court shall direct; and that the said Testator's Will may be established, and the Trusts thereof performed and carried into execution; and for general Relief.”

Mr. *Richards* was Counsel for the Plaintiffs.

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for an Account of such produce. The Bill alleges, *inter alia*, that the Defendant *Culliford*, the Trustee, has entered into an improper contract with the Defendant *Laying*, for Sale of part of the Testator's Estates to him, and the Bill prays that such Sale may be set aside, and the Property re-sold under the direction of the Court.

To this Bill the Defendant *Laying* has demurred for multifariousness ; and it is alleged for him that he has no concern with the general Accounts of the Testator's Estate, and that he ought not to be joined as a Party in a Suit for such purposes ; but that if it were thought fit to impeach the Sale made to him, it ought to have been the subject of a distinct Bill.

In order to determine whether a Suit is multifarious, or in other words, contains distinct matters, the inquiry is not, as this Defendant supposes whether each Defendant is connected with every branch of the cause, but whether the Plaintiff's Bill seeks relief in respect of matters which are in their nature separate and distinct. If the object of the Suit be single, but it happens that different Persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different Persons must be brought before the Court, in order that the Suit may conclude the whole subject.

Here the Bill has the single object of an Account of the real and personal Estate of this Testator ; and that Account in part depends upon the question, whether the Defendant *Laying* is or not to be considered as the Purchaser of this Property.

This Demurrer must therefore be over-ruled. A new Demurrer is however taken at the Bar, *ore tenus*, that the other Purchasers ought also to be Parties. The Defendant *Laying* is made a Party, not because he is a Purchaser, but because his right to hold as Purchaser is questioned. The rights of the other Purchasers are not questioned, and therefore they are not necessary Parties.

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FOX v. BLEW.

29th July and  
10th August.

ON the 18th April 1820 the Plaintiff filed his Bill, describing himself as of *Baltimore* in *North America*.

The Defendant, who lived upwards of twenty Miles from *London*, appeared to the Bill, and before he obtained any Order for time to answer, or was in Contempt, moved on the succeeding 18th of May, that the Plaintiff might give security for Costs; which was ordered, and that such security should be given "before the said Defendant shall be obliged to put in her Plea, Answer or Demurrer (not demurring only) to the Plaintiff's Bill, and that the Defendant may have Six Weeks time after such security given, to put in her said Plea, Answer or Demurrer, (not demurring only), and a Commission, &c." This Order was served on the 6th of June.

*An Order was obtained, directing Security to be given for Costs; but the Order did not direct the stay of all Proceedings until such Security should be given; and, therefore, though no Security was given, a Motion of course for a Commission to examine some old Witnesses, was held to be regular; but in future, the Court intimated, that the Order in such*

On the 11th of July following, the Plaintiff, without having given security for Costs, as directed, applied as

*cases should direct all proceedings to be stayed until Security was given.*

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of course, for a Commission to examine some old Witnesses *de bene esse*, and an Order was made for that purpose.

Mr. *Pugh* now moved to discharge the latter Order for Irregularity, or that all Proceedings under the Order might be stayed until after the Plaintiff should have given security for Costs, pursuant to the Order for that purpose; contending, that no step in the Cause could be taken until security was given for the Costs.

Mr. *Wakefield*, *contra*:—

In general, when an Order is made to give security for Costs, the Order directs that all Proceedings shall in the mean time be stayed; and in such Case no Proceedings can be had until such security is given; but there is no such direction in the present Order.

In *Selia v. Hanson*, 19 Feb. 1800, Reg. Lib. B. 192, the Order was thus; “It is ordered, that the Plaintiff do procure some sufficient Person on his behalf to give security, according to the course of the Court, in 40*l.* before the Defendant is obliged to put in his Answer to the Plaintiff’s Bill; and it is further ordered, That all Proceedings be stayed until such security is given.” So, also, in *Walker v. Easterby*, 20th January 1802, Reg. Lib. B. 192, the Order was, “to give security according to the course of the Court, and in the mean time it is ordered that all Proceedings be stayed.” If the Order had been framed in that manner, the Plaintiff could not have moved for a Commission to examine Witnesses, but as it contains no direction for a stay of Proceedings until security is given for Costs, the Motion was regular.

The Motion stood over, in order that inquiry might be made into the practice.

On this day the *Vice-Chancellor* stated, that the more general form of the Order was, that security should be given, before the Defendant should be called upon to plead, answer, or demur; but that the Defendant might, if he pleased, word his Motion so as to obtain, as of course, an Order to stay all Proceedings until security were given. The *Vice-Chancellor* expressed his opinion, that the language of Orders, obtained as of course, ought to be uniform, and that the better way might be, in such cases, to make the Order for staying all Proceedings; but owing to the form of the Order obtained, He refused the present Motion.

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10th August.

ELLIOTT, by her next Friend, v. CORDELL and others.

28th July and  
10th August.

*B. HEMMING*, by his Will, 5th March 1800, bequeathed to his five Executors, the Interest and Dividends of 9,000*l.* Imperial 3 per-cent. Bank Annuities; and directed that the same should be applied in and towards the discharging of a debt of 300*l.* and Interest due from *Jas. Elliott*, the Husband of the Plaintiff, to one *Nelson*; and in the next place towards discharging a Debt of 600*l.* and Interest, due from *Elliott* to one *Willan*; and lastly in discharging a Debt of 500*l.*

*Legacy to a married Woman of the Dividends of 9,000 l. 3 per cents. during her Life, with a Bequest over. The Husband and Wife join in a Sale of this Life Interest, and the*

*Husband becomes a Bankrupt. On a Bill, filed by the Wife against the Purchaser, insisting on a Provision, held, that though the Court could have compelled a Provision by the Husband on his Bankruptcy, a Purchaser is not compellable to make such Provision.*

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and Interest, due from *Elliott* to one *Stringer* ; and when and so soon as such Debts should be discharged, the Testator gave unto the Plaintiff, by the description of his Niece *Mary Elliott*, Wife of the said *Jas. Elliott*, the Interest and Dividends of the said 9,000*l.* Imperial Annuities, during her life, with a Bequest over of the Annuities after her death. The Testator died soon after the making of his Will, and three of the Executors proved the same. The Assets were sufficient for the payment of the Testator's Debts and Legacies.

In 1810 *Jas. Elliott*, the Husband of the Plaintiff, granted an Annuity of 163*l.* during the Life of the Plaintiff, to the Defendant *Cordell*, for the sum of 999*l.* and *Elliott* and the Plaintiff, on the 7th April 1810, assigned their Interest in the Dividends of the 9,000*l.* Imperial 3 per-cent. Annuities to the Defendant *Cordell*, as a security for the due payment of the Annuity ; and as a further security, *Elliott* gave a Warrant of Attorney. In October 1813, *Jas. Elliott*, the Son, proposed to the Defendant to purchase the whole Life Interest of his Father in the 9,000*l.* Imperial 3 per-cents ; and on the 21st October 1813, he, and the Plaintiff his Wife, and the Defendant *Cordell*, in Consideration of the sum of 1,650*l.* conveyed their whole Interest in the 9,000*l.* Imperial 3 per-cents., and also the Dividends from that time, to *John Springall*, his Executors, Administrators and Assigns, to hold the same in Trust for the Defendant, his Executors, Administrators and Assigns, to the Intent that the Annuity of 163*l.* might be kept on foot. And by the same Deed, in consideration of 999*l.* the purchase Money for the said Annuity of 163*l.* ; and also in consideration of the further sum of 651*l.* therein mentioned to be paid by the Defendant to said *James*

*Elliott* the elder, with the privity of the Plaintiff, they, *James Elliott* the elder, and Plaintiff his Wife, granted, &c. unto the Defendant, his Executors, Administrators and Assigns, the whole of the Dividends of said 9,000*l.* Imperial 3 per-cent. Bank Annuities, to hold unto the Defendant, his Executors, &c. during the Life of the Plaintiff, subject to the Annuity of 163*l.* assigned to *Springall*, in Trust for the Defendant. By another Indenture, dated also on the 21st October 1813, between *James Elliott* the elder, and the Plaintiff his Wife, of the first part, *James Elliott* the younger, of the second part, the Defendant, of the third part, and *John Springall*, of the fourth part, the Interest of *James Elliott* the elder, and the Plaintiff his Wife, and also of *James Elliott* the younger, in certain Leasehold Premises, was demised to *Springall*, his Executors, Administrators and Assigns, during all the residue of an unexpired Term of ninety-nine Years, except the last twenty Days, in Trust for the Defendant, his Executors, Administrators and Assigns, to the end and Intent to protect and defend the Defendant, his Executors, Administrators, and Assigns; and also said Dividends and Interest of said 9,000*l.* Imperial 3 per-cent. Bank Annuities, of, from and against all Claim and Demands whatsoever, either at Law or in Equity, or otherwise, of or by said Plaintiff, or any other Person or Persons whomsoever, for maintenance or otherwise; and from all Actions, Suits, Costs, Damages and Expenses which Defendant, his Executors, Administrators and Assigns, or said *John Springall*, his Executors, Administrators and Assigns, might sustain by reason of any Interest therein, or demand, or otherwise; but nevertheless to permit the Plaintiff and her Assigns, or other the Person or Persons entitled thereto, to receive the Rents of the

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Premises thereby demised for such time as Defendant, his Executors, &c. should be in the actual enjoyment of the Interest and Dividends of the sum of 9,000*l.* three per-cents., according to the Deed of Assignment last mentioned, and subject thereto; and after the decease of the Plaintiff, and full payment of the Interest and Dividends of said 9,000*l.* three per-cents. up to her decease, in Trust for *James Elliott* the younger, his Executors or Administrators, or other the Person or Persons entitled thereto, and to assign the same as he or they should direct, and *James Elliott* the younger covenanted with Defendant, that he, his Executors, &c. would save harmless the Defendant, his Executors, &c. from all Titles, Claims or Demands, either at Law or in Equity, of or by the Plaintiff, or any other Person or Persons whomsoever, either for maintenance, or otherwise, and from and against all Actions, Suits, Costs, Damages and Expenses, which Defendant, his Executors, &c. or *John Springall*, his Executors, &c. might be put to, suffer, or sustain, by reason of any such titles, &c. or otherwise.

On the 15th January 1817, a Commission of Bankruptcy issued against *James Elliott*, under which he was found bankrupt. The Bill filed on behalf of the Plaintiff, by her next Friend, after stating the foregoing facts, further stated, that she had three Children dependent upon her, whom, in consequence of the Assignment to the Defendant, she is unable to support; and insisted that under the circumstances, the Assignment of the Dividends of the 9,000*l.* 3 per-cents. ought to be set aside, or ordered to stand, as a security only for what should be found due for Principal and Interest, upon an account to be taken; and that in the mean time

the Plaintiff was entitled to some portion of the Dividends of the said 9,000*l.* 3 per-cents. for the support of herself and her Children.

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The Bill then charged several circumstances to show that the Assignment of the Dividends of the 9,000*l.* was fraudulently obtained; and prayed, that the Assignment might be set aside and declared fraudulent and void; and that the Annuity granted to the Defendant, charged upon the Dividends, might also be declared fraudulent and void, so far as respected the charge thereof upon the Dividends, and that an Account might be taken of such Sums of Money received by the Defendant, or for his use, on account of the Annuity, and on account of the Dividend of the 9,000*l.* 3 per-cents. The Defendant, by his Answer, insisted on the validity of the Deed, and wholly denied the imputations of Fraud.

The only question made, was, whether the Wife had an Equity for a Provision out of this Life Interest against the Defendant?

Mr. *Bell*, and Mr. *Parker*, in support of the Bill.

Mr. *Lovatt*, for the Bankrupt:—

The Wife is entitled to a settlement, although the Legacy is only for her Life; and though it has been conveyed to a Purchaser, yet as he must take subject to the Wife's Equity; and the Wife may herself institute a Suit to enforce such settlement. In *Ex parte Colygame* (a) it was held the Wife might file a Bill to assert her Equity; and that a Purchaser of the Wife's Interest takes subject to the Wife's Equity, appears from *Grey* and

(a) 1 Atk. 192.

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*Kentish* (b), *Jewson v. Montson* (c), *Earl of Salisbury v. Newton* (d), *Bushnan v. Pell* (e), *Ellis v. Ellis* (f), *Roberts v. Roberts* (g), *Pope v. Crashaw* (h), *Pryor v. Hill* (i), *Like v. Berresford* (k), *Macauley v. Phillips* (l), *Lady Ellibank v. Montolieu* (m), *Murray v. Lord Ellibank* (n); in that Case of *Lady Ellibank v. Montolieu* it was questioned whether the Wife could maintain the Suit, but the Court held there was no objection to the Wife filing a Bill, by her next Friend, to assert her Equity. In *Atherton v. Knowel* (o) also, it was held the Wife might assert her Equity by Bill. In *Wright v. Morley* (p), the Wife, who had only a Life Interest, asserted her Equity by a Cross-Bill. A general Assignee of the Fund is subject to the Wife's Equity; why not then a particular Assignee? If by selling the Fund the Wife's Equity could be disappointed, the Husband would always sell it. There is no difference in principle between a gross Sum, and an Interest for Life. In the one case she is clearly entitled to a Settlement, and why not in the other? Before the Assignment the Wife might have applied for a Settlement, and why not afterwards? A Purchaser buys, subject to the Wife's Equity, and pays accordingly. In *Mitford v. Mitford* (q), the late *Master of the Rolls* expressed an opinion in favour of the Wife's Equity as against a Purchaser from the Husband, of her Interest.

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| (b) 1 Atk. 280.                                    | (k) 3 Ves. 511.                                |
| (c) 2 Atk. 417.                                    | (l) 4 Ves. 19.                                 |
| (d) 1 Eden, 370.                                   | (m) 5 Ves. 737.                                |
| (e) 1 Cox, 158.                                    | (n) 10 Ves. 84.                                |
| (f) 1 Dick. 373, and in<br>Supplement to Vin. Abr. | (o) Mentioned 5 Ves. 740.<br>S. C. 1 Cox, 229. |
| (g) 2 Cox, 422.                                    | (p) 11 Ves. 12.                                |
| (h) 4 Bro. C. C. 326.                              | (q) 9 Ves. 87.                                 |
| (i) <i>ibid.</i> 139.                              |  |

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Mr. *Hart*, and Mr. *Barber*, for the Defendants :—

The imputation of Fraud in this Bill is unsupported by Evidence, and has not been insisted upon. There is no doubt that if the Fund were a Sum in gross the Wife would have an Equity, if the Husband applied to this Court to obtain the Fund ; but it may be doubted whether the Wife's Equity could be insisted upon against a particular Assignee. Great respect is due to a *dictum* of Sir *William Grant*, but it is not equal to a Decision. But we contend that the Wife cannot file a Bill, insisting on her Equity. That was decided in *Roberts v. Roberts* (r). She asks for a Settlement on herself, not for her and her Children. If the Husband chooses not to apply for the Money, the Wife has no remedy ; and if she dies before him he takes the Property by Survivorship. For twenty Years this Purchase has not been objected to ; and now, her Husband being a Bankrupt, the Plaintiff insists on a Settlement. She joined in the Assignment, and participated in the Purchase Money paid for it. Who would buy a Life Estate in a Fund which a Husband has in right of his Wife, if at any time afterwards a Settlement could be enforced ?

The VICE-CHANCELLOR :—

This is, I believe, a new, and certainly a very important point ; I will look carefully into all the Authorities, and deliver my Opinion on a future day.

On this day the *Vice-Chancellor* gave his Judgment to the following effect : 10th August.

I find no authority for the Equity claimed by the Wife as against the particular Assignee, in the case of

(r) 2 Cox, 422.

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an Interest given to the Wife for her Life; and it does not follow as a corollary or consequence from any established doctrine of the Court. Where an absolute equitable Interest is given to the Wife, the Court will not permit the Husband to possess it, without making a Provision for the Wife, or her express consent; and all who claim under the Husband must take his Interest subject to the same Equity. But where an equitable Interest is given to the Wife, for her Life only, this Court does permit the Husband to enjoy it without the consent of the Wife, and without making any Provision for her. It is true, that if the Husband desert his Wife, and fail to perform the obligation of maintaining her, which is the condition upon which the Law gives him her Property, this Court will apply any equitable Interest which he retains for the Life of the Wife, either wholly, or in part, for the maintenance of the Wife; and if the Husband becomes Bankrupt, or takes the benefit of an Insolvent Debtors Act, this Court will fasten the same obligation of maintaining the Wife out of the Property of this description which devolves, by act of Law, upon the general Assignee; for when the title of such Assignee vests, the incapacity of the Husband to maintain the Wife has already raised this Equity for the Wife; but the same principle does not necessarily apply to a particular Assignee, for a valuable consideration, who purchased this Interest when the Husband was maintaining the Wife, and before circumstances had raised any present Equity in this Property for the Wife, whatever may be the force of general reasoning upon it. If, however, I considered it to be useful, that the same Rule should be applied to the particular Assignee, as to the general Assignee, which may be doubted, by declaring this Rule, in the

absence of all direct Authority, and of all Authority leading necessarily to the same conclusion, I fear that I should not be administering the actual Law of this Court, but I should be making a new Law, and I cannot venture to assume such a jurisdiction.

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The real foundation of this Suit was imputed Fraud, but as that has not been substantiated, the Bill must be dismissed, with Costs, to be paid by the next Friend.

Between J. E. STAMPER, Widow - - - Plaintiff,  
and

SAMUEL BARKER, Clerk, and ROBERT BAAS  
(Executors of *Samuel Barker*, the surviving Executor of *Samuel Barker*, the Testator in the Pleadings named) ELIZABETH SANNEVILLE, (The Wife of *Abraham Sanneville*, to whom, jointly with the Plaintiff, Administration had been granted, with the Will annexed, of *David Stamper*, the late Husband of the Plaintiff) and DAVID BROWN and ELIZA BROWN, Legatees under the Will of the said *David Stamper*, deceased - - - Defendants.

24th July and  
10th August.

*SAMUEL BARKER*, by his Will, 9th October 1781, directed his Executors, *Samuel* and *John Barker*, to *Wife, an Infant, being entitled to a present Interest in certain personal Property, and also to certain other contingent Interests, a Deed of Separation was entered into between herself, her Father, and her Husband, by which she was to retain her present Interest in the Property; and it was agreed that the Husband should have a certain Share in the contingent Property; if it should fall into Possession.*

*The Husband died before the Wife.*

*Held that the Deed was a Nullity as to the Wife; and that the contingent Interest falling into Possession, she was entitled by Survivorship.*

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lay out one moiety of the produce of his Personal Estate upon Government Securities, and the Interest thereof to be paid to the Testator's Daughter, *Jane Moxon*, Wife of *Thomas Moxon*, during her Life, and after her Decease, the Principal to be equally divided between the Children of his said Daughter, which might be living at her Decease, and to the Issue of such of them as might be then dead. The Executors laid out the moiety in the purchase of 120*l.* per Annum, Long Annuities, and the Dividends were received by *Jane Moxon*, during her Life. She died in November 1812, leaving two Children, *T. B. Moxon*, and the Plaintiff *J. E. Stamper*. *J. Barker*, one of the Executors, died, having appointed *Samuel Barker*, co-Executor of the first Testator, to be his Executor; and the said *Samuel Barker* afterwards died, and by his Will appointed the Defendants, the Reverend *Samuel Barker*, Clerk, and *Robert Baas* (two of the Defendants) Executors of his Will, who proved the same.

By the Will of *John Barker*, Esq. 15th February 1785, he bequeathed to his Executors 5,000*l.* 3 per-cent. Consols, upon Trust, to permit his Niece, *Jane Moxon*, the Mother of the Plaintiff, and her Assigns, to receive during her Life, 100*l.* per Annum, part of the Dividends, for her own use and benefit, and to pay to the Plaintiff and her Assigns, during the Life of her Mother, 50*l.* per Annum for her Maintenance and Education; and after the Decease of *Jane Moxon*, her Mother, upon Trust, to assign and transfer the whole of the principal Sum of 5,000*l.* 3 per-cents. unto *Thomas Barker Moxon* and the Plaintiff, Share and Share alike. In 1788, the Plaintiff, then an Infant, married *E. Stamper*. No Settlement was made on the Marriage.

By an Assignment of three parts, 9th November 1790, between *David Stamper* of the first part, the Plaintiff of the second part, and *Thomas Moxon*, the Father of the Plaintiff, and *John Dekewer* of the third part; after reciting the Wills of *Samuel Barker* and *John Barker*, and that by Indenture of three parts, 5th May 1788, between the said *Thomas Barker Moxon*, the said *David Stamper*, and the Plaintiff, of the first part, *Samuel Barker*, the Son, of the second part, and *Thomas Moxon* of the third part; the said *Samuel Barker Moxon*, *D. Stamper* and the Plaintiff, assigned all their Right and Interest in the 120*l.* Long Annuities unto the said *Samuel Barker*, his Executors, &c. upon Trust, to pay the said *Thomas Moxon*, the Dividends for his own use during his Life, and after his decease, upon Trust, to re-assign the said 120*l.* Long Annuities unto the said *Samuel Barker Moxon*, and *David Stamper*, and the Plaintiff his Wife, according to their respective Interests therein; and reciting, that differences having arisen between *Stamper* and his Wife, the Plaintiff, they had agreed to live separate; and that in consequence of such intended separation, and to provide for the support and maintenance of the Plaintiff, it had been agreed between *Stamper* and the Plaintiff, with the consent of said *Thomas Moxon*, her Father, that *Stamper* and his Wife should assign the Annuities or yearly Sum of 50*l.* and also their reversionary Interest in the said Sum of 5,000*l.* 3 per cents. and 120*l.* Long Annuities, to said *Thomas Moxon* and *John Dekewer*, they, *David Stamper* and the Plaintiff, bargained, sold, &c. unto said *Thomas Moxon* and *John Dekewer*, their Executors, &c.; the said Annuity of 50*l.* so given to her during the Life of her Mother, and the Share in the 5,000*l.* 3 per-cents. given to the Plaintiff

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after the Death of her Mother, and also the 120*l.* Long Annuities, To hold the same unto said *Thomas Moron* and *John Dekewer*, their Executors, &c. upon Trust, to pay the Annuity of 50*l.* to the Plaintiff, for her own sole and separate use during the Life of her Mother, *Jane Moron*; and if she should die during the Life of her Mother, to assign the said Annuity of 50*l.* unto her Husband *David Stamper*, his Executors, &c.; and upon further Trust, that they, *Thomas Moron* and *John Dekewer*, their Executors, &c. should stand possessed of one half of the moiety of the said Sum of 5,000*l.* 3 per-cents. and one half of a moiety of the 120*l.* Long Annuities, in Trust for the said *David Stamper*, his Executors, &c. and that the said *Thomas Moron* and *John Dekewer* should stand possessed of the remaining half part of a moiety of the said 5,000*l.* and 120*l.* Annuities, in Trust for the Plaintiff, her Executors, &c. for her sole and separate use as she by any Writing, or by her Will, should appoint, and for want of appointment, to such Person as under the Statutes of Distribution would be entitled, if she had died intestate, or unmarried. And it was by the said Indenture further agreed, that if at any time or times thereafter any real or personal Estate should descend to or devolve upon the Plaintiff, to or in which, or to or in any part or parts thereof respectively, the said *David Stamper*, his Heirs, Executors, &c. might claim, the same should be divided equally between the said *David Stamper*, his Heirs, &c. and the Plaintiff and her Heirs, &c. and all necessary acts or deeds should be executed for that purpose.

*David Stamper*, the Husband, died in 1805, having, by his Will, bequeathed as follows: ‘ ‘As to the Property

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I have coming to me at the decease of *Jane Moron*, the Mother of my Wife *Jane Elizabeth Moron*, which Property will appear by my Articles of Separation from said Wife, I give and bequeath all the said Property to *David Brown* and *Elizabeth Brown*, equally alike divided, the Son and Daughter of my Brother-in-law *Robert Brown* and *Eliza Brown* his Wife." The Executor named in his Will died in his Life-time, and Letters of Administration, with the Will annexed, were granted to the Plaintiff, and the Defendant, *Elizabeth Sanneville*, 30*l.* one moiety of the 60*l.* Long Annuities, had been transferred to the Plaintiff.

The Plaintiff filed her Bill, praying, that she might be declared entitled as one of the two Children of *Jane Moron*, living at her death, and as surviving her Husband, to the said Sum of 30*l.* Long Annuities, standing in the names of the Defendants *Samuel Barker* and *Robert Baas*, and to the Dividends due thereon since the death of the said *Jane Moron*. The Infants, *David* and *Elizabeth Brown*, by their Answer, submitted, that the 30*l.* Long Annuities claimed by the Plaintiff, vested in her Husband, *David Stamper*, deceased, in pursuance of the Deed of Separation of the 9th of November 1790, and passed to them under his Will.

Mr. *Hart*, and Mr. *Sugden*, for the Plaintiff:—

When the Plaintiff married, and when the Deed of Separation was executed, the Plaintiff had only a contingent Interest in the 120*l.* Long Annuities, and it could not be assigned unless for a valuable consideration. Even a vested Interest in a Legacy given to the Wife, cannot, it has been held, be assigned by the Husband in consideration of natural love and affection,

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so as to prevent the Wife's right in case she survive her Husband. That was held in *Beckett v. Beckett* (r). The late Master of the Rolls (s), in *Mitford v. Mitford* (t), held, that the General Assignment in Bankruptcy has not the effect of reducing into Possession a Legacy of Stock in Trust for the Bankrupt's Wife; and seemed of opinion that the Wife had a claim even against a Purchaser for a valuable consideration: and in *Wright v. Morley* (u), the same Judge held the same doctrine.

In *Woollands v. Croucher* (x), there is a mistake in the marginal Note, which represents the Property as being a reversionary *contingent* Interest, it was a *vested* reversionary Interest, and the Consent of the Wife to an Assignment was only taken *de bene esse*. In *Hornsby v. Lee* (y), the late *Vice-Chancellor* (z) held, that an Assignment by the Husband and Wife, of a reversionary Interest of the Wife in certain Trust Stock, did not (she having survived her Husband) preclude her from claiming the same.

The present point arose in *Cordell v. Acton*, in 1818, in the Court of Exchequer; and it was held upon the preceding Authorities, that the Wife surviving, was entitled, as against a particular Assignee for a valuable consideration. Supposing, however, that the Husband could, for a valuable consideration, assign a reversionary Interest of his Wife; this Case is distinguishable. Here the Wife had a Life Interest in certain Property, and an absolute Interest in other Property to which she

(r) 1 Dick. 341.

(s) Sir Wm. Grant.

(t) 9 Ves. 87.

(u) 11 Ves. 17.

(x) 12 Ves. 174.

(y) *Ante*, vol. ii. p. 16.

(z) Sir Thomas Plumer.

was entitled in certain events. The Husband and Wife separate. The Husband was entitled to the Property, He could not contract with himself. If the Husband could not give to the separate use of his Wife her *chores in action*, the Husband cannot make himself a Purchaser of his Wife's Contingent Interests, unless for a valuable consideration; and she is clearly entitled, by Survivorship, to such part of her Property as her Husband did not reduce into Possession.

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It should be observed, also, this is a Deed of Separation, to which this Court is called upon to give effect.

Mr. *Bell*, and Mr. *Hone* :—

Can no Property of this description be settled? A Settlement was made after the Marriage by the Husband, and the Wife and the Wife's Father (she being an Infant), were Parties to the Deed. Having survived her Husband, she now seeks to nullify that Settlement. No Decision has gone that length. Since the execution of that Deed, in 1790, the Plaintiff enjoyed the benefit of the Settlement, and can she now claim in opposition to it? If such a Settlement had been made before Marriage, and the Father a Party to it, it would have been binding; and though this Settlement was after Marriage, it is equally binding. He must be considered as a Purchaser of this Property, for he gives up to the Wife the 50*l.* a year, to which he was entitled in her Right, during the Life of her Mother.

The Husband might have assigned the Wife's reversionary Interest for a valuable Consideration. She insists, not merely on an Equity to a Settlement, but on the whole of the Property.

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The *Vice-Chancellor* expressed an Opinion in favour of the Plaintiff's Claim, but said he would look into the Cases.

The VICE-CHANCELLOR [after stating the Case]:—

If the Plaintiff's Husband had survived her Mother, and the Property had come into Possession, the provision made for the Wife by the Deed of Separation would have been a full satisfaction for her Equity, being the Share which the Court usually attributes to the Wife; but the Question is not whether the Settlement would in such event have been a Satisfaction of the Wife's Equity, but whether, in the event which has actually happened, the Wife, as against the Representatives of the Husband, is, by the Deed of Separation, effectually excluded from her Title by Survivorship? At the time of this Deed, this Lady, as an Infant, was incapable of contract; she was also incapable of contract as a Feme Covert, and especially of contract with her Husband. As far, therefore, as this Deed is to be considered as the act of this Lady, it must be a mere nullity.

It is said, that her Father was a Party to this Deed on her behalf, and that he could well contract for her. It is true, that the Law of this Court permits a Father, or Guardian of a female Infant to contract, before Marriage, on her part, with her intended Husband, as to her personal Estate, because otherwise it would become his Property; and as to her Jointure, because her benefit, and the convenience of Families requires it. But there is no Principle or Authority for stating that after Marriage a Parent or Guardian can bind the Interest of an Infant Feme Covert, by contract with

her Husband. I am of opinion, therefore, that the Title of the Wife, by Survivorship, is unaffected by this Deed.

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*Ex parte* HUNTER and another, *in re* GOODCHILD.

11th August.

**CORSBIE & Co.** being under Embarrassment, the Bank of England agreed to advance them 40,000*l.* upon the Acceptances of their Friends, at a limited Period, amounting, in the whole, to that Sum; which Acceptances the Bank promised to renew for twelve Months. *Corsbie & Co.* to secure their Friends who had given such Acceptances, by a Deed, 10th Oct. 1814, assigned certain Property in *North America* to Trustees for that purpose; and it was provided in the Deed, that in case any or either of them should decline, or omit, or cease to renew their or either of their Acceptances, then that the Trustees should hold the Trust Property for the benefit of such Person or Persons as should be substituted and succeed in accepting, drawing, and transacting the same, or the like Acceptances. Two of the Acceptances secured by the Trust Deed were as follow:

**C. & Co.** being embarrassed, the Bank of England agreed to advance them 40,000*l.* upon Acceptances of the Friends of **C. & Co.** The Acceptances were given, and the Acceptors, or any substituted Acceptors, were secured by **C. & Co.** assigning to Trustees, for that

purpose, certain Property in America. Two of these Acceptances were thus: **C. & Co.** drew a Bill on **J. & W. J.** for 2,500*l.* which they accepted, and it was indorsed by **C. & Co.** to the Bank. **R.** accepted another Bill to that amount, drawn by **J. & W. J.** which was also given to the Bank. The Bills, when they became due, were renewed. Before the renewed Acceptance of **J. & W. J.** became due, they stopped Payment; and **R.** the Drawer, being called upon, he obtained an Acceptance from **C. T. T.** and indorsed it to the Bank, and the Acceptance of **J. & W. J.** was thereupon delivered to him. **J. & W. J.** becoming Bankrupt, **R.** proved the Amount of their Acceptances in his Possession, and received 18*s.* in the Pound. On Petition, the Proof of **R.** was ordered to be expunged, the Dividends repaid, and the Bill delivered up.

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*J. Rayner* drew upon *John and William Jackson* for 2,500*l.* at three months, which Bill they accepted; and the same was indorsed by *Rayner* to *Corsbie & Co.* and by them indorsed to the Bank; and *John and William Jackson* drew upon *Rayner*, at three months, for 2,500*l.* which Bill *Rayner* accepted, and *John and William Jackson* indorsed to *Corsbie & Co.* and they indorsed to the Bank. These Bills were renewed by the Bank when they became payable, and the renewed Acceptance of *Rayner*, at three months, was dated on the 22d February 1815, and that of *John and William Jackson* was dated on the 25th April 1815. In June or July 1815, before their renewed Acceptance became due, *John and William Jackson* suspended their Payments; and the Bank, before the renewed Acceptances of the *Jacksons* became due, required another Acceptance, in lieu of that given by the *Jacksons*; and, in consequence, *Rayner* drew a Bill upon *C. T. Thornhill*, which he accepted, and the same was indorsed to the Bank.

The period of twelve months, during which the Bank had agreed to extend their Loan by the renewal of the Bills, expired in September 1815; but they agreed to extend the period for six months longer, upon one half of the 40,000*l.* being immediately paid; and, in consequence, in September 1815, the Acceptance of *C. T. Thornhill*, for 2,500*l.* so substituted for that of the *Jacksons*, was discharged, by payment of the Trustees under the Trust Deed, of the Sum of 485*l.* 8*s.* 3*d.* and by payment of the sum of 764*l.* 11*s.* 9*d.* by *C. T. Thornhill*, and by another Acceptance of a Bill, drawn by *Rayner* on *C. T. Thornhill*, for 1,250*l.* and delivered to the Bank; and the former Acceptance of *C. T.*

*Thornhill* for 2,500*l.* was delivered up to him by the Bank. The renewed Acceptance of *Rayner* for 2,500*l.* was, in like manner, discharged, by payment by the Trustees, of 485*l.* 8*s.* 3*d.* and by payment, by *Rayner*, of 764*l.* 11*s.* 9*d.* and by his Acceptance of a Bill, drawn by *C. T. Thornhill*, for 1,250*l.* delivered to the Bank; and his former Acceptance was delivered up to him.

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In November 1815, *Corsbie & Co.* became Bankrupts, and therefore the Bank required payment of the remainder of the Loan; and *C. T. Thornhill* having stopped Payment, *Joseph Rayner* paid the Bank the amount of the Acceptance of *C. T. Thornhill*, of the Bill drawn upon him by *Rayner* for 1,250*l.*; and paid, also, his own Acceptance of the Bill to that amount, drawn upon him by *C. T. Thornhill*.

Previously to the execution of the Deed of the 10th of October 1814, *C. T. Thornhill* guaranteed *Rayner* from all the consequences of accepting the Bills of *John* and *Wm. Jackson*.

On the 10th November 1815 a Commission of Bankrupt issued against *John* and *William Jackson*, and Assignees were chosen.

On the 23d December 1815, *Rayner* proved a Debt of 2,500*l.* under the Commission against *John* and *William Jackson*; the Deposition being thus: "Saith that *John* and *William Jackson*, the Persons against whom, &c. were, at and before the date and issuing forth of the said Commission, and still are, justly and truly



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indebted to this Deponent in the sum of 2,500*l.* upon and by virtue of the Bill of Exchange hereinafter mentioned, the consideration for which was Cash paid by this Deponent to the Governor and Company of the Bank of England, to the full amount thereof; for which said sum of 2,500 *l.* or any part thereof, this Deponent hath not, nor hath any Person by his Order, or to his Use, received any Security or Satisfaction whatsoever, save and except a Bill of Exchange for 2,500*l.* drawn by this Deponent upon, and accepted by, the said Bankrupts, dated the 25th April 1815, payable three months after date; and also save and except a certain Memorandum of Guarantee from *C. T. Thornhill*, dated 13th September 1814.

At the time of such proof, the existence of the Deed of Trust, and the substitution of the Acceptances, were not known to the Petitioners, or to the Assignees of *John and William Jackson*.

On the 14th November 1815, a Commission of Bankrupt issued against *John Goodchild* the elder, the said *John and William Jackson*, and *John Goodchild* the younger, *James Jackson* and *Thomas Jones* the elder, as Bankers and Co-partners; and the Petitioners, together with *William Hustter*, were chosen Assignees; and by an Order, 2d April 1816, the Commission against *John and William Jackson* was superseded, and the Proofs which had been taken under the same transferred, as Proofs against their Estate, to the Proceedings under the joint Commission against Messrs *Goodchilds, Jackson & Co.*; and that the Assignees under the Commission against *J. and W. Jackson* should be

appointed Inspectors and Managers of the Concerns of the joint and separate Estate of *John and William Jackson*, with Powers to collect in the same, in as full and effectual manner as if they had been Assignees under the said joint Commission against the Messrs. *Goodchilds, Jackson & Co.*

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On the 10th December 1817, Mr. *Hustter* was removed from his situation of Assignee, on account of indisposition, and thereupon an Assignment of the Estate and Effects of the Bankrupts was executed to the Petitioners on the 26th January 1818.

On the 15th February 1817, *Rayner* received from the Estate of *John and William Jackson*, a Dividend of 14 s. in the Pound upon his Proof; and on the 1st November 1817, he received a further Dividend of 1 s. 6 d. in the Pound; and on the 14th October 1818, a further Dividend of 2 s. 6 d. in the Pound, making in the whole a Dividend of 18 s.

At the time the respective Dividends were paid, the Petitioners and *William Hustter* were ignorant of the Facts before stated, except as to the Guarantee by *C. T. Thornhill*; and *Rayner* assured the Solicitors of the Petitioners he had not received any part of the alleged Debt proved by him.

The Prayer of the Petition was, that the whole of the Proof of the alleged Debt of 2,500*l.* made by *Rayner* against the separate Estate of *J. and W. Jackson*, under the Commission issued against them, and which, by the Order of the 2d April 1816, was ordered

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to be transferred to the joint Commission against Messrs. *Goodchild, Jackson & Co.* might be expunged; and that an Account of the Dividends received by *Rayner* might be taken; and that *Rayner* might be ordered to refund to the Petitioners, as such Assignees, what should appear to be due from him on such Account, together with Interest at 5 per cent.; and that the Bill of Exchange of 2,500*l.* so accepted by the said *J. and W. Jackson*, might be ordered to be delivered up to the Petitioners by *Rayner*; or otherwise, that a Moiety of the said Proof might be expunged, and that a like Account of the said Dividends upon the whole of the said Proof received by *Rayner*, or on his behalf, might, in such case, be taken; and that *Rayner* might be ordered to refund to the Petitioners, as such Assignees, a moiety of what should appear to be due from him on such account, with Interest at the rate aforesaid; and that, in such case, also the Bill of Exchange for 2,500*l.* so accepted by *John and Wm. Jackson*, might be ordered to be delivered up by *Rayner*.

Mr. *Bell*, and Mr. *Raithby*, for the Petition.

Mr. *Agar*, *contra*.

The VICE-CHANCELLOR:—

This is a complicated Case; but when the facts are understood, the principle upon which it must be determined is very clear.

[*His Honor* here stated the facts of the Case.]

If *Rayner* had paid the Bills when the *Jacksons* stopped payment, he would have had a clear Demand

against the *Jacksons*; and the *Jacksons* would have had a clear Demand over against *Corsbie & Co.* who were then solvent. In the place of paying these Bills, and thus raising, by circuit, this immediate Demand against *Corsbie & Co.* he is a Party to a Transaction with *Thornhill*, by which a new Security to the Bank is, for the accommodation of *Corsbie & Co.* substituted in the place of the *Jacksons*. With this new arrangement *Jacksons* had no concern, and their Estate cannot be charged with the consequences of it.—The Proof must be expunged, and the Dividends refunded, and the Bill delivered up.

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END OF PART I.

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C A S E S

BEFORE THE

VICE-CHANCELLOR.

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Between His Majesty's ATTORNEY GENERAL, at  
the relation of the Rev. CHARLES HARDINGE,  
Clerk ; JAMES HOSMER, Churchwarden ; JOHN  
LUXFORD, Esq. and JAMES ELDRIDGE WEST,  
Esq.       -       -       -       -       -       -       Plaintiffs ;  
and

The Master and Wardens of the Guild or Fraternity of  
the Body of Christ, of the Skinners of *London*, and  
FRANCIS GREGG       -       -       -       Defendants.

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THE Information and Bill stated, that previously to  
the year 1554, Sir *Andrew Judd*, Knight, erected a cer-  
tain School-house in the Town of *Tonbridge*, and  
founded a Free Grammar School therein, for the good  
education, bringing up, and instruction of the Children  
*The Skinners Company held, to be Trustees of certain Lands, in their corporate character, as*

*Governors of the Possessions, Revenues and Goods of the Free Grammar School of Sir A. Judd, Knight, in the Town of Tonbridge, Kent, and that the same are held by them, according to the Tenor of Letters Patent of Edward the Sixth, "for the Support of the Master and Under-Master of the said School, and for the Reparation of the said Lands and Tenements, and not otherwise, nor to any other Uses and Intents."*

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of such Town, and of the County of *Kent*, adjoining to the same; and having erected the said School, he applied for and obtained a Charter for founding and establishing the same, and a License from the Crown to hold Lands in Mortmain, for the support of the School; and such Charter and License were made and granted by Letters Patent, under the Great Seal of *England*, dated in the seventh year of the Reign of his Majesty King *Edward* the Sixth; and which Letters Patent were in the Latin Language, and being translated, are as follow; viz. “The King to all to whom, &c. Greeting; Know ye, that we at the humble Petition of Sir *Andrew Judd*, Knight and Alderman of our City of *London*, for the erecting and establishing a Grammar School in the Town of *Tonbridge*, in our County of *Kent*, for institution and instruction of Boys and Youth in the said Town and County there adjacent, of our special Grace and our certain Knowledge and mere Motion, do will, grant and ordain, that from henceforth there may and shall be one Grammar School in the said Town of *Tonbridge*, which shall be called the Free Grammar School of the aforesaid Sir *Andrew Judd*, Knight, in the said Town of *Tonbridge*, for the education, institution and instruction of Boys and Youth in Grammar, to continue for ever; and the same School of one Master (or Pedagogue), and one Under-Master (or Usher), to continue for ever, we do erect, create, and found by these Presents: And that the intent aforesaid may the better take effect, and that the Lands, Tenements, Rents, Revenues and other things to be granted, assigned and appointed towards the support of the School aforesaid, may the better be governed for the continuance of the same School, we will and ordain that from henceforth the aforesaid Sir *Andrew Judd*, during his natural life, shall be and be called ‘Governor

of the Possessions, Revenues and Goods of the said School.' And after the death of the aforesaid Sir *Andrew Judd*, we will and ordain that the Master, Wardens and Commonalty of the Mystery of Skinners of *London*, for the time being, shall be and be called 'Governors of the Possessions, Revenues and Goods of the said School,' commonly called and to be called 'The Free Grammar School of the said Sir *Andrew Judd*.' And therefore know ye that we have assigned, elected, nominated and constituted, and by these Presents do assign, elect, nominate and constitute the aforesaid Sir *Andrew Judd* to be the first and present Governor of the Possessions, Revenues and Goods of the said Free Grammar School, well and faithfully to exercise and occupy the same office during his natural life; and after the death of the aforesaid Sir *Andrew Judd*, the aforesaid Master, Wardens and Commonalty of the Mystery of Skinners of *London* aforesaid, and their Successors for the time being, well and faithfully to exercise and occupy the same office, from the death of the aforesaid Sir *Andrew Judd*, for ever. And that the same Sir *Andrew Judd*, during his natural life, may and shall be Governor in deed, fact and name; and during his life shall and may be a Body Corporate and Politic of himself, by the name of Governor of the Possessions, Revenues and Goods of the Free Grammar School of the aforesaid Sir *Andrew Judd*, Knight, incorporated and erected. And the same Sir *Andrew Judd*, Governor of the Possessions, Revenues and Goods of the said Free Grammar School, during his life, by these Presents we do incorporate, and a Body Corporate and Politic by the same name, really and fully, we do create, erect, ordain, make and constitute, by these Presents. And we will, that after the death of the aforesaid Sir *Andrew Judd*, the same Master, Wardens and Com-

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monalty of the Mystery of Skinners of *London* aforesaid, and their Successors, may and shall be Governors of the said School, in deed, fact and name; and from thenceforth may and shall be one Body Corporate and Politic of themselves, for ever, by the name of ‘Governors of the Possessions, Revenues and Goods of the Free Grammar School of the aforesaid Sir *Andrew Judd*, Knight, incorporated and erected.’ And the same Master, Wardens and Commonalty, and their Successors, Governors of the Possessions, Revenues and Goods of the said Free Grammar School, after the death of the aforesaid Sir *Andrew Judd*, for ever, by these Presents we do incorporate, and a Body Corporate and Politic of the same name, to endure for ever, really and fully, we do create, erect, ordain, make and constitute by these Presents. And further, we will, and by these Presents ordain and grant, that the same Sir *Andrew Judd*, Governor, during his life, of the Possessions, Revenues and Goods of the said Free Grammar School, by the same name, may and shall be able and capable in the law, during his life, to have and receive for the term of his life, as well of us, our Heirs and Successors, as of any other Person or Persons whomsoever, Lands, Tenements and Hereditaments whatsoever, towards the support of the School aforesaid; the Remainder thereof to the aforesaid Master, Wardens and Commonalty of the Mystery of Skinners, and their Successors, for the support aforesaid. And also, we will, and by these Presents ordain and grant, that after the death of the aforesaid Sir *Andrew Judd*, Knight, the aforesaid Master, Wardens and Commonalty of the Mystery of Skinners of *London* aforesaid, for the time being, shall be ‘Governors of the Possessions, Revenues and Goods of the said Free Grammar School,’ and shall have perpetual succession: and by the same name may and shall be

Persons able and capable in law to have and receive Lands, Tenements, Meadows, Feedings, Pastures, Rents, Reversions, Revenues and Hereditaments whatsoever, as well of us, our Heirs or Successors, as of the aforesaid Sir *Andrew Judd*, his Heirs, Executors or Assigns, or of any other Person or Persons whomsoever, in like manner towards the support of the School aforesaid. And further, we will, and for us our Heirs and Successors grant, by these Presents, to the aforesaid Governor and their Successors, that from henceforth they shall have a common Seal to serve for their Business, touching or concerning only the Premises and other things in these Letters Patent expressed and specified, or any parcel thereof. And that the same Governors, by the name of 'Governors of the Possessions, Revenues and Goods of the Free Grammar School of the aforesaid Sir *Andrew Judd*, Knight, in *Tonbridge*, aforesaid,' shall be able to plead and be impleaded, defend and be defended, answer and be answered, in whatsoever Courts and Places, and before whatsoever Judges, in whatsoever Causes, Actions, Businesses, Suits, Complaints, Pleas and Demands, of whatsoever nature or condition they may be, touching or concerning the Premises, or any parcel thereof; or for any Trespasses, Offences, Things, Causes or Measures by any Person or Persons done or perpetrated, or to be done or perpetrated, in or upon the Premises, or any part thereof, or for any things in these Presents specified: And moreover, of our future Grace, and of our certain Knowledge and mere Motion, we have given and granted, and by these Presents do give and grant, to the aforesaid Sir *Andrew Judd*, the present Governor, during his natural life, full Power and Authority to nominate and appoint the Master and Under-Master of the School aforesaid, as often as the same School shall be void of a Master:

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And that the same Sir *Andrew Judd*, during his life, from time to time shall make, and shall and may be able to make, fit and wholesome Statutes and Ordinances in writing, concerning and touching the order, government and direction of the Master and Under-Master and Scholars aforesaid, for the time being; and the Stipend and Salary of the same Master and Under-Master, and other things touching and concerning the same School, and the order, governance, preservation and disposition of the Rents and Revenues to be appointed for the support of the same School; which same Statutes and Ordinances so to be made, we will, grant, and by these Presents command to be inviolably observed from time to time for ever: And moreover, we have given and granted, and by these Presents do give and grant, to the aforesaid Master, Wardens and Commonalty of the Mystery of Skinners of *London*, and their Successors, and the major part of them for the time being, that they after the death of the aforesaid Sir *Andrew Judd*, Knight, shall have full power and authority to nominate and appoint the Master and Under-Master of the School aforesaid, so often as the said School shall be void of a Master and Under-Master; and that the same Governors, with the advice of the Wardens and Fellows of the College of *All Saints*, in the University of *Oxford*, for the time being, shall and may be able to make (if need shall be) fit and wholesome Statutes and Ordinances in Writing, concerning and touching the order, government and direction of the Master and Under-Master, and Scholars of the School aforesaid for the time being, and other things touching and concerning the same School, and the order, government, preservation and disposition of the Rents and Revenues to be appointed for the support of the same School; which same Statutes and Ordinances so to be made, we will,

grant, and by these Presents command inviolably to be observed from time to time for ever. And moreover, of our further Grace we have given and granted, and by these Presents do give and grant for us, our Heirs, and Successors, to the aforesaid Master, Wardens, and commonalty of the Mystery of Skinners of *London* aforesaid, and their Successors, special Licence, and free and lawful Faculty, Power and Authority, to have, receive and purchase to them and their Successors for ever, towards the support and maintenance of the School aforesaid, as well of us, our Heirs or Successors, as of the aforesaid Sir *Andrew Judd*, Knight, or of any other Person or Persons whomsoever, Manors, Messuages, Lands, Tenements, Rectories, Tithes and other Hereditaments whatsoever, within our kingdom of *England*, or elsewhere within our Dominions, provided they shall not exceed the yearly value of 40*l.*; any Statute concerning Lands, and Tenements not to be put into Mortmain, or any other Statute, Act, Ordinance or Provision, or any other thing, cause or matter to the contrary thereof, had, made, enacted, ordained, or provided in anywise notwithstanding: And we will, and by these Presents ordain, that all the Issues, Rents and Revenues of all the Lands, Tenements and Possessions hereafter to be given and assigned towards the support of the School aforesaid, from time to time, shall be converted to the support of the Master and Under-Master of the School aforesaid for the time being; and to the reparation of the said Lands and Tenements, and not otherwise, nor to any other Uses or Intents: And we will, and by these Presents grant to the aforesaid Governors, that they may and shall have these our Letters Patent, under our Great Seal of *England*, in due manner made and sealed, without Fine or Fee, great or small, to us in our Hanaper or elsewhere to our use for the same, in anywise to be

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rendered, paid or done, although express mention, &c.”—That for the maintenance and support of the Master, and Usher, and of the said School, the said Sir *Andrew Judd* purchased divers Messuages, Lands, Tenements and Hereditaments, then of the yearly value of 30 *l.* or thereabouts, situate in the Parishes of *All Saints, Gracechurch-street*, and *St. Pancras*, in the county of *Middlesex*, which lands were conveyed to the said Sir *Andrew Judd* and one *Henry Fisher*, a Trustee for the said Sir *Andrew Judd*, as Joint-tenants in Fee.—That the said Sir *Andrew Judd*, during his life, received the Rents, Issues and Profits of the said Lands so purchased as aforesaid, amounting to the annual sum of 30 *l.* and applied the same in the payment of 20 *l.* annually to the Master of the said School, 8 *l.* annually to the Usher of the said School, and laid out in the repairs of the School-house, or reserved for the repairs thereof, the remaining sum of 2 *l.* per annum. And the said Sir *Andrew Judd*, in his life-time, made and published certain Rules and Ordinances respecting the management of the said School, and the disposition of the Revenues thereof, such Revenues amounting at that time as aforesaid to the sum of 30 *l.* per annum; and the Rule or Ordinance relating to this disposition of the Revenues of the said Charity, was in the words and figures, or to the purport and effect following; that is to say, “I will that the Master receive quarterly for the Wages, 5 *l.* and the Usher 40 *s.* and that they have their Dwelling rent-free; and all other Charges, as in repairing of the said School, in all manner of Reparations, borne and allowed necessarily, and according to the view from time to time taken by the said Skinners.”—That the said Sir *Andrew Judd* by his Will, bearing date the 2d day of September 1558, and which was well made according to the Statutes then in being for the devise of freehold estates, thereby gave and de-

vised the same Hereditaments which he had purchased as aforesaid, and also certain other Messuages, Lands, Tenements and Hereditaments whereof he was seised at the respective times of making his Will, and of his Death, to the support of the said School so erected and founded by him as aforesaid: and the said Will, so far as relates to the devise of the said Messuages, Lands, Tenements and Hereditaments, was in the words or to the purport and effect following; that is to say, “ And whereas I, the said Sir *Andrew Judd*, have built and erected a Free Grammar School at *Tonbridge*, in the county of *Kent*, to have continuance for ever; for the maintenance and continuance whereof, I give, will and bequeath unto the Masters and Wardens of the Fraternity of *Corpus Christie*, of the Craft or Mystery of Skinners of the City of *London*, all that my Close of Pasture, with the Appurtenances, called *The Sandhills*, situate and lying on the backside of *Holbourn*, in the parish of *St. Pancras*, in the county of *Middlesex*, being of the yearly value of 13*l.* 6*s.* 8*d.*; and all that my Messuages or Tenement, with the Appurtenances, situate, lying and being in the *Old Swan Alley* in *Thames-street*, in the parish of *St. Lawrence Poulteney* in *London*, being of the yearly value of 6*l.* 3*s.* 4*d.* now in the tenure or occupation of one *Maurice Dyer*; and all that my Messuage or Tenement, with the Appurtenances, situate, lying and being in the parish of *Allhallows* in *Gracechurch-street*, *London*, now in the tenure or occupation of *William Judd*, Skinner; and also all my Messuage or Tenement, with the Appurtenances, in *Gracechurch-street* aforesaid, in the said parish of *Allhallows*, now in the tenure or occupation of *Jackson*, Shoemaker; which said two Messuages or Tenements aforesaid, in the said Parish of *Allhallows*, be now of the yearly value of 7*l.*; and all that my Messuage or Tenement in

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*Gracechurch-street* aforesaid, in the said parish of *Allhallows*, now in the tenure or occupation of *Thomas Smith*, Haberdasher, of the yearly value of 8*l.*; and all that my Messuage or Tenement, with the Appurtenances, situate in *Gracechurch-street* aforesaid, in the said parish of *Allhallows*, now in the tenure or occupation of *Christopher Piper*, Ironmonger, of the yearly value of 53*s.* 4*d.*; and all that my Messuage or Tenement, with the Appurtenances, in *Gracechurch-street* aforesaid, in the said parish of *Allhallows*, now in the tenure or occupation of *Thomas Peterborowe*, of the yearly value of 40*s.*; and all my Messuage or Tenement, with the Appurtenances, in *Gracechurch-street* aforesaid, in the parish of *St. Peter* in *Cornhill, London*, now in the tenure or occupation of ——— *Uxley*, Grocer, of the yearly value of 4*l.*; and all that my new Messuage or Tenement, with the Appurtenances, situate, lying and being within the Close of *St. Helen's* in *London*, and in the parish of *St. Helen's* in *London*, now in the tenure or occupation of ——— *Hall*, Widow, late the Wife of *Thomas Hall*, Grocer, deceased, of the yearly rent of 40*s.*; and all those my Messuages, Tenements and Gardens, with their Appurtenances, situate, lying and being in the parish of *St. Mary Axe, London*, of the yearly value of 5*l.*—To have and to hold all and singular the aforesaid Messuages, Tenements, Gardens and other the Premises, with the Appurtenances, before willed and bequeathed unto the said Master and Wardens, and their Successors for ever: And furthermore, I give, will and bequeath unto the said Master and Wardens of the said Fraternity of *Corpus Christie*, of the Craft or Mystery of Skinners, of the said City of *London* aforesaid, one Annuity or Yearly Rent of 10*l.* of lawful Money of *England*, going out and to be yearly perceived and taken out of all that my Messuages or Tenements, with the Appurtenances, in *Graces-street* afore-

said, called the *Bell*, to hold, perceive and take the said Annuities or Yearly Rent of 10*l.* unto the said Master and Wardens, and their Successors for ever, at four Terms of the Year yearly; to be paid, that is to say, at the Feasts of the Birth of our Lord God, the Annunciation of our Blessed Lady the Virgin, the Nativity of St. John Baptist, of St. Michael the Archangel, by even Portions; and if it fortune that the said Annuity or Yearly Rent of 10*l.* to be behind, unpaid in part or in all by the space of one month next after any day or term of payment thereof, in which as before it ought to be paid, that then and so often it shall be lawful to and for the said Master and Wardens and their Successors, as well by themselves as by their certain Attorney or Attornies, into the said Messuage or Tenement, called the *Bell*, to enter and distrain, and the Distress or Distresses there found, lawfully to lead, drive, bear and carry away, and the same with them to retain and keep until the said Annuity or Annual Rent of 10*l.* with all the Arrears of the same, shall be unto the said Master and Wardens, their Successors or Assigns, fully contented, satisfied and paid: And I will, that the Rents, Issues, Revenues and Profits yearly arising, renewing and coming of the Messuages, Lands and Tenements, and other the Premises given, willed and bequeathed unto the said Master and Wardens, their Successors in manner before expressed, shall be by them and their Successors, employed and bestowed in manner and form following, that is to say; 1st. I will, that the said Master and Wardens for the time being shall yearly content and pay the Schoolmaster of my said Free Grammar School, at *Tonbridge* aforesaid, for the time being, for his Stipend and Wages 20*l.* at four terms in the Year; that is to say, at the Feast of St. Michael the Archangel, the Birth of our Lord God,

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the Annunciation of our Blessed Lady the Virgin, and the Nativity of St. John the Baptist, by even Portions, or within one month next after every of the said Feasts. Item, to the Usher of the said School for the time being, 8*l.* of lawful Money of *England*, at four times and days of payment aforesaid, or within one month next after every of the said Feasts, by even Portions. Item, I will that the said Master and Wardens for the time being, shall once in the year for evermore, ride to visit the said School, and there to see and consider whether the said Master and Usher of the said School do their Duties towards the Scholars of the said School, in teaching of them of Virtue and Learning, and whether the Scholars of said School do of their parts use themselves virtuous and studious, and whether they do observe and keep the orders and wills of my said Free Grammar School or not: And I will that the aforesaid Master and Wardens in their said Visitation, shall take order, that if any of the Rules and Orders of my said Free School shall fortune to be broken, either by the Master or Usher of the said School, or by any of the Scholars of the same, that then the same may be forthwith reformed and amended according to the good discretion, and as my special trust and confidence is in them: And I will that the said Master and Wardens for the time being, shall yearly have for their Labour and Pains, therein to be taken, for their Expences in their behalf 10*l.* yearly: And also I will that the said Master and Wardens for the time being, shall for ever weekly pay, or cause to be paid, unto the six poor Almsmen inhabited in my Almshouses, within the close of *St. Helen's* aforesaid for their relief 4*s.* that is to say, to every of them 8*d.* weekly; and I will the same to be paid every Sunday in the year by the hands of the Renter Warden of the said Company of Skinners, for the time being; and

I will that the said Renter Warden for his pains, to be taken in and about the payment of the said Almsmen as is aforesaid, shall have yearly out of the Rents and Profits of the said Premises 10s.: And further, I will that the Renter Wardens of the said Company of Skinners shall bestow yearly, out of the Rents and Profits of the Premises, 25s. 4d. upon Coals, which Coals so bought, I will shall be yearly distributed and delivered by the said Renter Warden to and amongst the said six Almsmen, for their further Relief and Comfort: And I will the residue of all the Rents, Issues and Profits yearly, coming and growing of the said Messuage, Tenement, Lands, Gardens, and other the Premises bequeathed to the said Master and Wardens, shall be employed by the said Master and Wardens for the time being, upon the needful reparations of the Messuage or Tenement aforesaid; and the Overplus thereof remaining, I will shall be to the use and behoof of the said Company of Skinners, to order and dispose at their wills and pleasures.”—That the said Sir *Andrew Judd* died soon after the date of his said Will, and after his Death the said *Henry Fisher* conveyed to the Master, Wardens and Commonalty of the Mystery of the Skinners of *London*, the Messuages, Lands, Tenements, Hereditaments and Premises which had been so purchased by the said Sir *Andrew Judd* as aforesaid.—That after the death of the said *Henry Fisher*, his Heir-at-Law endeavoured to impeach and disturb the said Conveyance, and that thereupon, and in the year 1572, in the fourteenth year of the Reign of Queen *Elizabeth*, upon the application of the said Master and Wardens and Commonalty of the Mystery of Skinners of *London*, a certain Act of Parliament was made and passed, intituled “*An Act for the better and further assurance of certain Lands and Tenements to the maintenance of the Free Grammar*

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*School of Tonbridge, in the County of Kent;*" whereby, after reciting the foundation of the said School by the said Sir *Andrew Judd*, and the said Letters Patent, and reciting that for the maintenance and sustenance of one Schoolmaster and Usher of the said Free Grammar School, certain Messuages, Lands, Tenements and Hereditaments of the yearlie value of thirtie pounds or thereabouts, situate, lying and being in the Parish of *All Sayntes*, in *Graycious-street*, in *London*, and *Parysshe of St. Pancrasse*, in the County of *Myddleser*, were purchased of one *John Gates*, esq. and *Thomas Thorogood*, gent. by the said Sir *Andrew Judde*, for the sum of Foure hundred thirtie Pounds sixe Shillings Eight-pence of his Money, only paid unto the said *John Gates* and *Thomas Thorogood*, and in the Conveyance the said Sir *Andrew Judde* in truste did joyne with himself one *Henry Fyssher*, late of *London*, deceased, some time servant to the said Sir *Andrew Judde*, because the said *Andrew Judde*, at the time of the said purchase of the said Premises, fully meant and determined to have the Premises conveyed and assured unto the said Master, Gardyons, Corpoaltie of the Skynners of *London*, as verye evidently and credyble did appear; and after the death of the said Sir *Andrew Judde* the said *Henry Fisher*, according unto the true intent and meanynge of the said Sir *Andrew Judde*, and in and for the accomplishment and performance of the Trusts, Confidence in him the said *Henry Fisher* reposed by the said Sir *Andrew*, in the fourth year of the Reign of Her Majesty Queen *Elizabeth*, did convey and assure the Premises, together with other Lands, Tenements and Heredytaments of his own, situate, lying and being within the Parish of *St. Peter*, in *Graciouse-street*, in *London*, of the value of 6*l.* or thereabouts, whereof the said *Henry Fisher* therein stood sole seised in fee-simple, unto the said

Master, Gardyans and Comynaltye of the Mystery of the Skynners of *London*, as well for the better sustentation of the said Free Grammar School, as for the sustentance of one Student in the University of *Oxforde*; which said conveyance and assurance of all and singular the Premises, made by the said *Henry Fisher* unto the aforesaid Marster, Gardyons and Comyaltie, had been since the death of the said *Henry Fyssher*, somewhat discredited and impeached by a certain Indenture therein particularly mentioned: Therefore, for adveydenge of all ambigytie and doubts which at any time thereafter might aryse and ensue against the goodness or validitie of the aforesaid conveyance and assurance of the Premises made by the said *Henry Fyssher*, *bonâ fide*, unto the aforesaid Marster, Gardyans and Comynaltie of the Premises unto the said Master, Gardyans and Comynaltie of the Mystery of the Skynners of *London*, unto the godly Uses, Intents and Purposes above expressed, It was ordained and enacted, That the aforesaid Indenture, and also the said Enrolment of the same, and all Exemplifications thereof, from thenceforth for ever should be and be taken, reputed, deemed and adjudged of non-effecte, and merely frustrate and voy'd to all intents, constructions and purposes for and concerning all Lands, Tenements and Hereditaments assured for the mayntenance of the said Scole, as was above said; and that all Lands, Tenements and Hereditaments, with the Appurtenances, assured or conveyed unto the aforesaid Marster, Gardyans and Corporaltie of the Skynners in *London*, as is aforesaid, should from thenceforth ever continue, remayne and be unto the said Marster, Guardians and Comynaltie of the Mysterie of Skinners of *London*, to the godly Uses and Intents observed."—That after the date of the said last-mentioned Act, *Andrew Fisher*, the Heir of the said *H. Fisher*, having again

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attempted to impeach the Title of the said Skinners Company to the aforesaid Lands, as such Trustees as aforesaid, upon the ground of a mis-description of the said Company in the several Deeds and Instruments aforesaid, a certain other Act of Parliament was in the year 1589, in the 31st year of the Reign of Queen *Elizabeth*, made and passed upon the application and petition of the said Company, which Act was intituled, "*An Act for the better assurance of Lands and Tenements in the maintenance of the Free Grammar School, at Tonbridge, in the County of Kent*;" whereby, after reciting the several matters aforesaid, except the Will of the said Sir *Andrew Judd*, and reciting that the said *Andrew Fisher* had endeavoured and gone about to impeach the aforesaid Conveyance, Letters Patent, and Act of Parliament, by pretence of the mis-naming of the true Corporation which should have taken the same, It was enacted by authority of that present Parliament, That the name of the Incorporation of the Skynners of *London*, either to have, enjoye, obtayne, acquyre, or purchase, or to grant, assure or to convey to others, and to sue or to be sued, from thenceforth for ever should be in manner and form following; viz. Master, Wardyns and Comynaltie of the Mysterie of the Skinners of *London*, either to have, enjoye, obtayne, acquire or purchase, or to grant, assure or to convey to others, and to sue or be sued, from thenceforth for ever should be in manner and form following; viz. Master, Wardyns, and Comynaltie of the Mysterie of the Skinners of *London*, and that name should from thenceforth be incorporate for ever, and that the right and true name of the Incorporation, made and created by the said Letters Patent of the said late Kynge *Edwarde* the Sixth, concerning the said Grammar Schole, had been, was and should be, to all intents, constructions and purposes, in manner and

form following; viz. Governors of the Possessions, Revenues and Goodes of the Free Grammar Schole of Sir *Andrewe Judde*, Knight, in the Towne of *Tonbridge*, in the County of *Kent*: And it was further Enacted, by the Authoritee aforesaid, That all the Letters Patent, Deeds, Writings, Assurance and Conveyances before mentioned, and the said Act of Parliament, should be of and for all such Houses, Lands Tenements and Hereditaments as weare in anywise conveyed, meant or intended to or for the said Free Grammer Schole, good and effectuall in Law, to the Governors of the Possessions, Revenues and Goode of the Free Gramer Schoole of Sir *Andrew Judd*, Knight, in the Town of *Tonbridge*, in the Countie of *Kent*, to all intents, constructions and purposes; and that the Master, Wardens and Comynaltie of the Mysterie of the Skinners of *London*, should have, hold and enjoy for ever, all Houses, Lands, Tenements and Hereditaments whatsoever, with the Appurtenances, assured and conveyed unto the Corporation of the Skynners of *London* by anye, or meant, or mencyoned, or intended to be assured or conveyed unto them by the said *Henry Fisher*, as aforesaid, by any name or names whatsoever, other than such Houses, Lands, Tenements and Hereditaments as were in anywise conveyed or assured, or meant or intended to be conveyed or assured, to or for the use of the said Free Gramer Schoole of Sir *Andrew Judd*, Knight, in the Town of *Tonbridge*, in the County of *Kent*, should have, hold and enjoy for ever, all such Houses, Lands, Tenements and Hereditaments whatsoever, with the Appurtenances, as were assigned or conveyed, or meant or mencyoned, or intended to be assigned or conveyed unto them by any of the Letters Patent, Writings, Conveyances, or Acte of Parliament before mentioned, to or for the said Free Gramer Schoole.”—That ever since the date of the said last-

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mentioned Act, the Master, Wardens and Commonalty of the Mystery of Skinners of *London*, have been and they still are, as such Trustees as aforesaid, in Possession of all the Messuages, Lands, Tenements, Hereditaments and Premises so conveyed and devised to them as aforesaid, in trust for the maintenance and support of the said School so founded at *Tonbridge* aforesaid, subject nevertheless to the application of some part of the Rents and Profits of the Premises, devised by the said Testator's Will, to the maintenance of the Alms-people therein mentioned; the said School hath been ever since and still is continued at *Tonbridge* aforesaid, and there had been and are now a Schoolmaster and Usher in the said School, duly appointed by the said Skinners Company.—That the Rents and Profits of the said Estates and Premises, so conveyed and devised to the said Master, Wardens and Commonalty of the Mystery of Skinners of *London*, for the purposes aforesaid, have very greatly increased, and that the same amount now to several Thousand Pounds per annum, and that the Master, Wardens and Commonalty of the Mystery of Skinners of *London*, have received and do receive the whole of such Rents and Profits, and that they have thereout kept and do keep the said School and Premises in Repair, and have paid and do thereout, the sum of 20*l.* annually to the Master of the said School, and the further sum of 8*l.* annually to the Usher of the said School, and they have usually for several years past, by a vote of said Company, presented the Master and Usher of the said School with the sum of 42*l.* annually between them, and making the whole Receipts of the Master and Usher from the said Estates amount only to the sum of 70*l.* per annum, and the whole surplus of the said Rents and Profits amounting to several Thousands per annum, the said Master, Wardens and Commonalty

of the Mystery of the Skinners of *London*, have annually appropriated and do now appropriate to their own use.—  
That *Francis Gregg*, of *Skinners Hall*, in the City of *London*, gentleman, is now the Clerk or Secretary of the said Company, and is in the habit of receiving, on behalf of the said Company, the Rents and Profits of said Company's Estates and of the said Charity Estates, and of settling the Accounts respecting the same, and he is intrusted with or keeps in his possession all the Deeds, Books and Papers of the said Company, and he is well acquainted with all the particulars of the Foundation and Endowments of the said School, and of the Estates belonging to the same, and the Rents and Profits thereof, and of all Deeds, Evidences and Writings relating thereto, and in particular the deed made by *Henry Fisher*, in the said Act of Parliament mentioned.—That applications have been frequently made to the Master, Wardens and Commonalty of the Mystery of the Skinners of *London*, to account for the Rents and Profits of the said Trust Estates and Premises received by them as aforesaid, and to apply the same to the purposes of the Trusts upon which the said Estates are vested in them, and particularly to apply a competent part of the Revenues of the said Charity to the maintenance and support of the Master and Usher of the said School, so founded by the said *Sir Andrew Judd* as aforesaid.

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The *Prayer* of the Bill was, that an Account might be taken, by and under the Directions and Decree of this Court, of all and singular the Messuages, Lands, Tenements, Hereditaments and Premises, conveyed or devised to the Defendants, the Master, Wardens and Commonalty of the Mystery of the Skinners of *London*, by the said *Sir A. Judd*, or his Trustees, by the



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Conveyance and Will hereinbefore mentioned; and that it might be declared, that all the Rents, Issues and Profits of the Messuages, Lands, Tenements, Hereditaments and Premises, vested in said Corporation by virtue of the said Conveyances, are applicable and ought to be applied to the support of the said School so founded by the said Sir *A. Judd*, at *Tonbridge*, as aforesaid, and to the maintenance and support of the Schoolmaster and Usher therein; and that it may be declared, that all the Rents, Issues and Profits of the Messuages, Lands, Tenements, Hereditaments and Premises, which passed to the said Corporation under the Will of the said Sir *A. Judd*, are applicable and ought to be applied to the support of the said School, and the maintenance of the Schoolmaster and Usher, subject to the appointment of a part of the said Rents and Profits amongst the poor Almsmen of the Foundation of the said Sir *A. Judd*, and subject also to the Deductions, by the said Corporation or Company, of a proportion of the said Rents for their Trouble, according to the proportion of 10*l.* to the Rents of the said Estates, at the date of the said Will; and that it may be referred to one of the *Masters* of this Court to take an Account of all and singular the Rents, Issues and Profits of the several Estates and Premises belonging to the said Charity, and other the Revenues thereof, received by the said Defendants the Master, Wardens and Commonalty of the Mystery of the Skinners of *London*, or by their order, or for their use, and of the applications and dispositions thereof, and that they may answer such parts of the said Rents, Profits and Revenues as shall appear to have been improperly applied by them, from such time as this Court shall direct; and that it may be referred to the said *Master* to apportion the Rents of the Estates and Premises, and other Revenues, devised by the Will of the said Sir

*A. Judd*, amongst the different Parties interested in the same under the said Will, and to settle a Plan for the future application of all the Rents and Profits of the Estates, and other the Revenues belonging to the said School at *Tonbridge*, to the uses of the said School, and of the Schoolmaster and Usher thereof; and that for the purposes aforesaid, all necessary Directions might be given.

The *Master and Wardens* of the *Skinners Company*, by their Answer, admitted most of the material facts stated in the Information; and submitted that the Company have been and now are in possession of the Lands conveyed to them for their own use and benefit, subject to the payment of the Stipends and sums of Money, and other Charges directed to be paid out of the Rents and Profits by the Will of Sir *A. Judd*, and not otherwise, as Trustees, or in any character.

The Answer further stated, that the Rents and Profits of the Estates and Premises, so devised and conveyed to the Master and Wardens of the *Skinners Company*, now amount to the annual sum of 4,306*l.* 1*s.* 6*d.*; and that, after paying thereout 20*l.* annually to the Master of the School, and 8*l.* to the Usher, according to the Will of Sir *A. Judd*, and, according to a Vote of the Company for some years past, a further sum of 31*l.* 10*s.* to the Master, and 10*l.* 10*s.* to the Usher, as a Gratuity, and not as due out of the Rents and Profits, they applied the remainder of the Rents and Profits to the general purposes of the Company.

They further stated, that they have not in their custody or power the Deed in the Information stated to have been made by *Henry Fisher* to the Company, or

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any Copy, Abstract or Extract thereof, and denied that they had at any time destroyed, suppressed or cancelled any Papers relating to the Estate.

The Defendant *Gregg*, by his Answer, denied he was the Receiver of the Rents and Profits of the Company's Estates; and stated, that the same are received by a Member of the Company; and that the Books, Papers and Writings relating to the Matters in the Information, except certain Accounts mentioned in his Answer, are in the possession and keeping of some of the Company; that he had perused the Answer of the Company, which he believes to be true, and that he cannot make any further Answer to the Bill than is contained in that Answer.

Mr. *Hart* (for the *Attorney General*), Mr. *Bell*, and Mr. *Horne*, for the Relators:—

The object of this Information is, to have an Account taken of the Rents and Profits of a very considerable Estate, which we contend has been dedicated to charitable Purposes. If our construction of the Instruments be right, the Account is of course. On the other side, it will be contended, on behalf of the *Skinners Company*, that the Rents, which amount to upwards of 4,000*l.* a year, belong to them beneficially, after deducting the Expences of the School, which amount to about 40*l.* a year. The case is thus:—At the conclusion of the short reign of *Edward* the Sixth, Sir *Andrew Judd*, a Merchant, who was born at *Tonbridge* in Kent, built a House for the purpose of a public School; and to give the School permanency, he obtained Letters Patent from *Edward* the Sixth, by which a Licence was given to purchase Lands of the value of 40*l.* a year, which were to be held in Mortmain for the maintenance of the School, and of the Master and Usher, and for no other

purpose; and the Skinners Company, before incorporated under the name of "*The Master, Wardens and Commonalty of the Skinners of London*," were, for the purposes of this Charity, made a new and distinct Corporation, and incorporated under a different Title, by the name of "*The Governors of the Possessions, Revenues and Goods of the Free School of Tonbridge*." After obtaining these Letters Patent, Sir Andrew Judd made certain Bye-laws for the regulation of the Charity. They are dated the 6th of *Elizabeth*, after the death of Sir Andrew Judd; but it is clear they originated from him. They contain all the Rules and Regulations, and how all parties were to conduct themselves as to this School. Sir Andrew afterwards died, having, by his Will, dated in 1558, disposed of his Lands; he, after a Provision for his Wife and Children, makes a Recital, upon which the question to the Residue depends. [That part of the Will was here read, stated in the Pleadings *ante*, p. 185, begining with the words "And I will," &c. and ending with the words "wills and pleasures,"] There is a difference between the Parties on the construction of this Will. We say, the Will was inoperative, and that the Charter and subsequent Acts of Parliament are what is alone to be looked to. But suppose the Will operative, what is its effect? The *Skinners Company* say, that by the words "and the Overplus remainings shall be to the use and behoof of the said *Company of Skinners*, to order and dispose at their will and pleasures," it was meant that they should have an absolute dominion over the Rents and Profits of this Estate, for their own use, after repairing the Premises, and giving Salaries to the Master and Usher of the School, and retaining 10*l.* (or 40*s.* as the other side say) for *their* Trouble as Visitors; but we contend that this Surplus so given, was given to be disposed of by them for the pur-

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poses of the School. The words “to order and dispose of at their will and pleasures,” is not the way in which an absolute Gift would be expressed; it is the language of a Trust. The Bequest meant, not an application for their own purposes, which could not be intended, and which the Law did not allow, they being a Corporation, but for the general purposes of the Charity School, for which Charity they, by the Licence of King *Edward*, might take. The Rents of the Lands devised, when Sir *Andrew Judd* died, amounted to 60*l.* 13*s.* 4*d.*; the Charges were 43*l.* 3*s.* 4*d.*; and the Surplus, therefore, at that time amounted to 17*l.* 10*s.* 4*d.* This Surplus was then very small, so much so, that when Sir *Thomas Smith*, in 1620, was disposed to make a Gift to the Skinners Company for the benefit of the Town of *Tonbridge*, they refused to accept the Trust, owing to the experience that they had, of great Trouble and little or no Profit, in the instance of Sir *Andrew Judd*’s Charity. Nothing passed, or could pass, to the Skinners Company, for their own benefit, by Sir *Andrew Judd*’s Will, for the Statute of Mortmain prevented the grant of Estates to any Bodies Corporate for their own benefit, except under a Licence from the Crown. The Grant was not void, but it enured, as a Forfeiture, to the Crown. The Licence of *Edward* the Sixth did not enable the Skinners Company to take any thing beneficially, but only for the maintenance of the *Tonbridge School*; and it was a sort of Fraud in the Skinners Company, under the pretence of that Licence, to insist that by a Gift under Sir *Andrew Judd*’s Will any Lands passed to them beneficially, the Licence to alienate being expressly confined by the Licence to the benefit of the School. Another insuperable objection is that at that period Freehold Estates were not devisable; for the Statute of Wills, 34 & 35 *Hen.* 8. c. 5, expressly

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excepts Devises in Mortmain ; and the Licence of *Edward the Sixth*, would not, in opposition to the Law of the Land, have enabled Sir *E. Judd* to have made any devise in Mortmain to the Skinners Company. It happened, that Sir *A. Judd* had, with his own Money, purchased this Estate in the names of himself and of one *Fisher*, who had been his confidential Clerk, and *Fisher* surviving Sir *A. Judd*, the Estate vested in him. So matters stood until the fourth *Elizabeth*, in which year *Fisher* conveyed the Estate to the Skinners Company for the benefit of the School ; and he also conveyed to them an Estate of his own in the Parish of *St. Peter*, of the value of 6*l.* to be applied to six Almsmen, and for the sustenance of one Student at the University of *Oxford*. [*Vice-Chancellor*:— I know nothing of that in this Suit]. After enjoying the Estate, for some years a claim was made against them by the Son and Heir-at-Law of *Fisher*. Under these circumstances the Skinners Company themselves applied to the Legislature, (such Applications being frequent in those days to remedy defects in Conveyances, a Power now exercised by Courts of Equity), and by the Fourteenth *Elizabeth* an Act passed. [The Act as before stated in the Bill, *ante*, p. 185, &c. was here read]. The operation of the Act is confined to this Estate, which, by the Act, is vested in the Skinners Company, under the Title of “ The Governors of the Possessions and Revenues of this School,” who are thereby directed to apply the Rents and Profits for the use of the School. The Skinners Company did not then make any claim for their own Benefit, and they cannot now say that any part of the Property conveyed by *Fisher* to them, belonged exclusively to *Fisher*, and is applicable in any other manner than as directed by the Act of Parliament, namely, for the purposes of the School. They are estopped by the Act from claiming a beneficial interest

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in the Lands. Both by the Will of Sir *A. Judd*, and the Act of Parliament, the Property is dedicated to the use of the School. Notwithstanding the Act of Parliament, the Heir-at-Law of *Fisher* renewed his Claim, on the ground that the Act of the Fourteenth of *Elizabeth* was not an execution of the Trust, because, according to the Trust, the Land was not to be vested in "*The Master, Warden and Commonalty of the Skinners of London*," but in "*The Governors of the Possessions, Revenues and Goods of the Free School of Tonbridge*," according to the Licence of King *Edward*, and therefore that his Claim subsisted, notwithstanding the Act of Parliament. In consequence of this Claim the Thirty-first of *Elizabeth* was passed. [That Act, as before mentioned, p. 188, was here stated]. Taking all these Instruments together, the Letters Patent, the Bye-laws, the Will, and these two Acts of Parliament, the fair construction is, that the Skinners Company cannot, as such, take any beneficial Interest in any part of this Estate. The Thirty-first of *Elizabeth* is express, that the Skinners Company shall take no Estate in the Lands conveyed by *Fisher*, otherwise than as Trustees, for the use of Sir *A. Judd's* Free School.

Mr. *Heald*, Mr. *Winthrop*, Mr. *Phillimore*, and  
Mr. *Gregg*, for the Defendants :—

This is a Case of considerable importance, more especially to the Defendants, who have been in the possession and enjoyment of these Estates between two and three Centuries, and who, after such a lapse of time, must have great difficulty in substantiating the Title under which they originally took, owing to the loss of Deeds and other Documents. There are four Instruments to be considered: 1st. The Charter; 2d. The Will of Sir *Andrew Judd*; 3d. The private Act of Par-

liament of the 14 *Eliz.*; and 4th. The private Act of the 31 *Eliz.*

Under the Charter, the Skinners Company could not take any Lands until after the death of Sir *Andrew Judd*. He, under the Charter, was to be Governor of the Estate and School during his life. He was to make, and did make, Statutes for the School; and after his Death, the *Skinners Company* are to name the Master, and with the advice of the Warden and Fellows of the College of *All Souls* in *Oxford*, for the time being, are, if required, to make Statutes for the government of the School, and for the disposition of the Rents appointed for the support of the School; and a Licence is given to the Skinners Company to receive and purchase of Sir *A. Judd*, or others, Lands, &c. of the yearly value of 40*l.*; and the Rents, &c. of such Lands are to be given and assigned towards the support of the School, and to no other use and intent. This Charter was necessary, to constitute the Company of Skinners a Corporation to hold Lands for the benefit of the School to the amount of 40*l.* a year, which, but for the Charter, they could not hold out of the City of *London*; for the Citizens of *London* had, by Custom, a power of devising to Charity, Lands in *London* (a), which Custom was not affected by any Statute. According to the Charter, every thing was under the direction of Sir *And<sup>o</sup> Judd*, during his life, and, accordingly, no Conveyance was made to the Skinners Company. After the Charter was obtained, the School was built. Sir *A. Judd* died in the first year of Queen *Eliz.*; his Will was dated on the 2d of September 1558, and was proved on the 15th of October 1558; so that he must have died in the intermediate period. When he made

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(a) See *Middleton v. Cater*, 4 Bro. C. C. 410.



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his Will he was seised of the Estate in question. By his Will he disposes of this Estate, the Rents of which he intended to apply for the benefit of the School, which was a principal object of his regard. It may be difficult to contend, the Will, except as to Lands in *London*, was at that time valid, because, at that time, he could not devise or appoint Property under the Statute of Wills, and the Company could not take Lands in Mortmain, except so far as the Charter of *Edward* enabled them. The Will, therefore, in 1558, as a Devise to the Skinners Company, of the Lands in question, was invalid, but afterwards it was rendered a good Will by the 43 *Eliz.* c. 4. There are many Cases to that effect (b).

The VICE-CHANCELLOR :—

It is very singular, but certainly true, that a Devise to a Corporation before the 43 *Eliz.* has been established as a good appointment under that Statute. It is a very extraordinary doctrine. The Legislature could not have meant that—it must have meant by the use of the word “appointment,” in that Statute, a legal appointment.

*Defendant's Counsel*—continued.

Sir *A. Judd's* Will, therefore, though bad at first, was made good by the 43 *Eliz.* as an appointment, unless any thing took place between the death of the Testator and the passing of the 43 *Eliz.* which produced another effect; which vested the Estate afresh in the Skinners Company, and so superseded, and for ever nullified, the Will of Sir *A. Judd*, that the 43 of *Eliz.* had no effect upon it. This brings us to the consideration of the two

(b) These Cases are collected in the last Edition of *Duke's Charitable Uses*, p. 349, &c.; and see the extraordinary Decision alluded in *Rumbold v. Rumbold*, 3 Ves. 69, 70. The Statute was drawn by Sir *Francis Moore*.

private Acts of Parliament, which have been observed upon on the other side, and from which it may be collected that Sir *A. Judd* had purchased Property from two Persons of the names of *Gates* and *Thorogood*; and some questions may arise, what that Estate was that was conveyed by them to him. It is clear, from the first private Act, the Estate consisted of Houses in *Gracechurch-street* and in the Parish of *St. Pancras*. Sir *And<sup>w</sup> Judd* having bought the Estate, it was conveyed to him and *Fisher*, his servant, who paid nothing, and was merely a Trustee. With what view the Conveyance was made, whether to prevent Dower, or what other purpose, is left to conjecture; it was, however, conveyed to them as Joint-tenants, and on the death of Sir *A. Judd*, it survived to *Fisher*. *Fisher* became seised in Fee of the legal Estate, but, according to the doctrine of this Court, as a Trustee for the Devisees of Sir *And<sup>w</sup> Judd*. The Skinners Company looking at the Will, called for the legal Estate, and *Fisher* conveyed it to them. If it be said, that previous to the Will the Lands conveyed to Sir *A. Judd* and *Fisher* were bound by a Trust for the School, the answer is, that the Will of *Judd* shows he considered the Land as not bound by any previous Trust, and that he meant to subject it to the Trusts stated in his Will. The Will subjects the legal Estate, in the hands of *Fisher*, to all the Trusts created by the Will. *Fisher* could convey on no other Trusts than those stated in the Will. The Skinners Company are, at this moment, as we contend, Trustees of this Estate, for the uses of the Will; for the Will, though bad at the time, by the Statute of Mortmain, was rendered effectual by the 43 *Eliz*. How could the Skinners Company hold this Estate, when the Conveyance was made by *Fisher*? He conveyed all the devised Estates; nothing appears to the contrary. It is said,

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they held it under the Charter; the answer is, the Charter did not authorize them to hold the devised Estates, as being of greater value than 40*l.* a year. The Will, though inoperative at the death of the Testator, is evidence of the value of the Lands, as therein stated; and it there appears to have been, not of the value of 40*l.* a year, but of 60*l.* In the Act, indeed, of the 14 *Eliz.* it is averred, that the Property amounted to 30*l.* a year, *or thereabouts*; what Property? From that Statute, no Person can infer that any other Property was conveyed except that in *Gracechurch-street*, and *St. Pancras*, and that the same was of the value of 30*l.* a year; but when you come to the 31 *Eliz.* it appears, by that Act, they were in the receipt of the Rents of Property, not only of the Property in those two places, but in other places; the Property before mentioned was worth 30*l.* a year, and the other Property is stated to be of the value also of 30*l.* a year; and thus it is left to conjecture what other Property was conveyed by *Fisher* to the Company. As Sir *A. Judd* had bought Lands, which he had determined to convey to the Skinners Company, and, at the date of his Will, his Property exceeded 60*l.* a year, it is probable the Land conveyed to *Fisher* exceeded 40*l.* a year at the date of the Conveyance and Licence. If the Property exceeded 40*l.* a year, and *Fisher* conveyed this Property, he conveyed more than the Skinners Company had a right to receive. The Skinners Company could not hold these Lands under the Charter, nor without the Charter; in that dilemma, the Heir-at-Law was interested, and the Court must have determined between the Parties. The Act of the 43 *Eliz.* however, set up the Will, and made it good, and thus operated as a benefit to the Skinners Company. The Act of the 14 *Eliz.* was for the purpose of nullifying a fraudulent Conveyance made by *Fisher*, in

favour of his Family, in the 3d of *Eliz.*; and for confirming the subsequent Conveyance by *Fisher*, to the Skinners Company in the 4th of *Eliz.* The Act, in effect, says “ the Conveyance to the Skinners Company, by *Fisher*, shall be considered as having the same effect and value as if there had not been a previous Conveyance of it by *Fisher*.” The Act did no more ; it decided nothing as between the Company and the School. The subsequent Act of the 31 *Eliz.* was to remedy the Mistake in the Conveyance by *Fisher*, of the 4th of *Eliz.* to the Skinners Company, they being described by a wrong Title ; the Act remedies this, and vests the legal Title in them. The Act certainly contemplated the execution of the Trusts in favour of the School, but the Will, creating the Trust, was void, until set up by the 43 *Eliz.* The 31 *Eliz.* did not deprive them of the benefit of the Will of the 43 *Eliz.* ; the 13 *Eliz.* only corrected the Conveyance of *Fisher* ; it left the Title of the Skinners Company, under the Will, where it was ; it determined nothing as between the Company and the School. There is a saving of the Rights of all Persons except *Fisher* and his Heirs ; no mention of the Will is made in that Act, or in the 14 *Eliz.* On the 43 *Eliz.* we make our stand—we say it rendered the Will good ; that the Will is a sufficient declaration of Trust, and precludes the idea of any other declaration of Trust ; that the Acts of the 14 & 31 *Eliz.* do not affect the Will, which was rendered effectual by the 43 *Eliz.* ; and that under the residuary Clause in the Will, the Skinners Company are entitled to the overplus of the Estate, after satisfying the 30 *l.* a year in favour of the *Tonbridge* School. The residuary Clause runs thus ; it gives it to the Company “ to order and dispose, at their wills and pleasure, of the Residue.” These are general words, and, as they are unqualified by any other part of the

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Will, they clearly give them a beneficial interest in the Surplus.

The VICE-CHANCELLOR:—

If this Case depended altogether upon the Language of the Will, and it were necessary now to determine whether the Surplus Rents, after satisfying the purposes of the Will, were to be at the absolute disposition of the Skinners Company, or whether the Skinners Company were intended merely to have a qualified disposition of such Surplus Rents to purposes of Charity only, it would be necessary to weigh every word of this Will with the utmost attention, in order to collect, from the whole context, the real intention of the Testator. It is admitted, that the Will comprises the several Lands and Premises which were purchased by Sir *A. Judd* of Mr. *Gates* and Mr. *Thorogood*, and were the principal subject of the two Acts of *Elizabeth*; and it is further admitted, that the Lands called in the Will *The Sandhills*, upon which the great increase of Rents has taken place, are part of the Lands so purchased by Sir *A. Judd*. There is, therefore, a preliminary question, Whether the Title of the Defendants, the Skinners Company, to the Lands so purchased by Sir *A. Judd*, depends upon the Will, or is paramount the Will, and unaffected by it? By the Letters Patent of *Edward* the Sixth, the Skinners Company, then an ancient Corporation, are invested with a new and special corporate character, by a new name of the “Governors of the Possessions, Revenues and Goods of the Free Grammar School of Sir *A. Judd*,” and by that name are declared capable to hold Lands in Mortmain of the yearly value of 40*l.* for the support of the Master and Usher of the said School, and for the reparation of the said Lands and Tenements, and not otherwise, nor to any other Uses or Intent. The

14th *Eliz.* after reciting these Letters Patent, states, that for the maintenance and sustentation of the Schoolmaster and Usher of the Free School, intended to be erected, Sir *A. Judd* had purchased certain Lands and Tenements of the yearly value of 30*l.*; and in the Conveyances, the said Sir *A. Judd*, of Trust, did join with himself one *H. Fisher*, because the said Sir *A. Judd*, at the time of the said Purchase, fully meant and determined to have the Premises conveyed to the Skinners Company; and that after the death of the said Sir *A. Judd*, the said *H. Fisher*, according unto the true intent and meaning of the said Sir *A. Judd*, and in and for the accomplishment and performance of the trusts and confidence in him the said *Henry Fisher* reposed by the said Sir *A. Judd*, had conveyed the said Lands and Tenements, with other Lands of his own, to the Skinners Company, as well for the sustentation of the said Free School as for the sustenance of one Student in the University of *Oxford*; by which is to be understood, that the Trust Lands of Sir *A. Judd* were to be applied, according to his Trust, to the sustentation of the Free School, and the Lands given by *H. Fisher* himself, to his new purpose of sustaining one Student in the University of *Oxford*. This Act then proceeds to avoid a previous Conveyance of these Lands which *Fisher* appears to have made for the benefit of his Family, and in fraud of his Trust, and to affirm the Conveyance so made to the Skinners Company. The 31st *Eliz.*, after a short recital to the effect of the former Statute, states, that notwithstanding that Statute, the Son and Heir of *Fisher* had impeached the Title of the Skinners Company to the Lands, upon the pretence of the mis-naming of the true Corporation which should have taken the same; and it proceeds to enact, that the Lands so purchased by Sir *A. Judd*, and conveyed

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by *Fisher*, should vest in the Skinners Company, not by their ancient Corporate Name, according to *Fisher's* Conveyance and the former Act of *Elizabeth*, but by their new Corporate Name of the Governors of the Possessions, Revenues and Goods of Sir *A. Judd's* Free Grammar School, and for the support of the said School.

It appears, therefore, from these two Statutes, which it is said were obtained at the solicitation of the Skinners Company, and which it is certain they accepted, that, in point of fact, the Lands in question were purchased by Sir *A. Judd* for the support of this Free School, and that he joined *Fisher's* Name with his own in the Conveyance, upon the Trust and Confidence, that after his death *Fisher* should convey the same to the Skinners Company for the support of this School, and that they are now vested in the Skinners Company, not in their ancient Corporate Character, but in their new and special Corporate Character, as Governors of the Possessions, Revenues and Goods of this Free School, and not under the Will, but by virtue of the Trust reposed and created in *Fisher* at the time of Sir *A. Judd's* Purchase. Sir *A. Judd*, after the creation of this Trust, would have had no power to devise these Lands, if the Law had then enabled any Person to make such a Devise; but by the Statute of Wills, no devise could then legally be made to a Corporation; and it is probably owing to this circumstance that these Statutes, the first of which was passed nearly fourteen years after the death of Sir *A. Judd*, takes no notice whatever of his Will, but founds the Title altogether upon the Trust created by Sir *A. Judd* at the time of the Purchase, It is true, that the extraordinary construction which has been given to the subsequent Statute of the 43d *Eliz.*

in favour of Charity, would now under the Will, considered as an Appointment, have given a Title to the Skinners Company as against the Heir of Sir *A. Judd*; but there was no such Law at that day, and these Acts of Parliament prove that the Skinners Company then claimed and accepted these Lands by Title paramount to the Will, and they cannot now disclaim that Title. It is argued, that the Will is evidence that there had been no prior Trust; but I think it not unnatural that Sir *A. Judd* should desire to confirm by a written Instrument the secret Trust which he had before reposed in *Fisher*; and to adopt this Argument would be to act upon a loose inference against the clear language of the Statutes. My opinion, therefore, is, that as to the Messuages and Lands, purchased by Sir *A. Judd* of *John Gates* and *Thomas Thorogood*, they are now vested in the Skinners Company, not under the Will of Sir *A. Judd*, but in consequence of the previous Trust created in *Fisher*, and by force of the Statutes of *Eliz.* and in their special Corporate Character as Governors of the Possessions, Revenues and Goods of the Free Grammar School of Sir *A. Judd*, Knight, in the Town of *Tonbridge*, in the County of *Kent*, and are held by them, according to the language of the Letters Patent of *Edward* the Sixth, for the support of the Master and Under-Master of the said School, and for the Reparation of the said Lands and Tenements, and not otherwise, nor to any other Uses and Intents. The Revenues of these Lands now so far exceed all possible Expence in respect of this School, that it will be necessary to require the aid of Parliament as to the application of the Surplus. All that I can now do is, to make a Declaration to the effect which I have stated, and to send it to the *Master* to inquire and state the Particulars and present Rents of the Messuages and Lands purchased by Sir

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*A. Judd* of *Gates* and *Thorogood*, and comprised in the two Statutes of *Eliz.*; and also to inquire into the Particulars and present Rents of all other the Lands, &c. comprised in the Devise to the Skinners Company, contained in the Will of Sir *A. Judd*; and whether the Skinners Company are now in the possession of the Annuity given by the said Will; and also to inquire and state what is the annual Expenditure of the Skinners Company in respect of the Six Almsmen mentioned in Sir *A. Judd's* Will; and to take the Account of the Rents and Profits, received by the Defendants from all these Lands, since the filing of this Information. After the *Master's* Report it will probably be found that there is such an excess of Revenue from the other Lands devised, not included in the Statutes of *Eliz.* as will make it necessary to decide the true construction of the residuary Gift in the Will in favour of the Skinners Company.

27th July.

14th Nov.

6th Dec.

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*Bequest of two Policies on a Life, upon certain Trusts.*

*The amount of the Policies was received by the Testator. Held, the Legacies were adeemed.*

*WALTER HAMMOND*, deceased, in his life-time effected two Policies of Insurance, in the Equitable Insurance Office, upon the Life of his Wife *Elizabeth Hammond*, one for 1,500*l.* and the other for 600*l.* payable to *W. Hammond*, his Executors, Administrators and Assigns, six months after the death of *Elizabeth Hammond*.

*W. Hammond*, being indebted to the Defendant *Rayner*, assigned to him, by way of security, the two Policies.

*Elizabeth Hammond* died in the life-time of *W. Hammond*, and the latter received the amount of the two Policies with the Accumulations due thereon; and out of the same paid *Rayner* his Debt, and the Residue *Hammond* invested in Securities, and the same remained so invested at his Death; and the Securities were in the possession of the Defendants *Rayner*, senior, and *Rayner*, junior.

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*W. Hammond* died on the 18th July 1817, and by his Will, dated the 18th July 1815, (made during the life of *Elizabeth Hammond*, and consequently before he received the amount of the Policies of Insurance), as follows:—"I nominate, constitute and appoint my good Friends, *William Rayner*, and *William Rayner* the younger, of, &c. Executors of this my Will; and I do give and bequeath unto them all my Right, Title and Interest in two Policies of Insurance, in the Equitable Insurance Office, the one for 1,500 *l.* bearing date the 10th day of September 1790, and made payable to me, my Executors, Administrators and Assigns, within six calendar months next after the decease of my Wife *Elizabeth*; and the other for 600 *l.* bearing date the 10th day of September 1795, and also made payable to me, my Executors, Administrators and Assigns, within six calendar months next after the decease of my said Wife; together with the said Policies, and all benefit and advantage thereof: To hold the same unto my said Executors the said *William Rayner*, and *William Rayner* the younger, and the Survivor of them, his Executors and Administrators, upon trust to pay or cause to be paid the annual Premium, to prove due upon the said Policies, during the natural life of my said Wife; and also to pay or cause to be paid unto my brother *Joseph* the annual sum of 20 *l.* and unto his Wife *Charlotte Sophia Frances Hammond*, the annual sum of 20 *l.*; and

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from and after the decease of my said Wife, upon trust to receive the principal Sums of 1,500*l.* and 600*l.* together with any Dividends or other sums of Money due to me by virtue of the said Policies, and to stand possessed of the same upon the Trusts, and for the intents and purpose hereinafter mentioned; that is to say, upon trust in the first place to pay and retain to their or his use, all such sum and sums of Money, which they my said Executors, or the Survivor of them, his Executors or Administrators, may have paid to the said Insurance Office, and to my said Brother and Sister, or otherwise, in the Execution of this my Will, together with full 5*l.* per cent. Interest upon such Sums; and after payment thereof, upon trust in the next place, to pay unto my daughter *Maria*, the Wife of *Peter Henry Barker*, the Sum of 500*l.* of good and lawful Money, if she shall be then living, but if dead to pay and divide the same unto all such of her Children as may be then living, in equal Proportions, Share and Share alike; and after payment of the said Sum, upon trust in the next place to put out at Interest the Residue or Remainder of the Monies, to be received by virtue of the said Policies, upon some real or government Security or Securities, in the Names of my Executors, and to pay and apply one half of the yearly Interest to arise therefrom unto my said Brother *Joseph Hammond*, and the other half of the yearly Interest unto his said Wife *Charlotte Sophia Frances Hammond*, for and during the terms of their natural Lives, and from and after the Decease of either of them the said *Joseph Hammond* and *Sophia Frances* his Wife, upon trust to pay the whole of the yearly Interest arising from the Residue of the said Monies, unto the Survivor, during his or her natural Life; and from and after the decease of the Survivor or longer liver of them, the said *Joseph Hammond* and *C. S. F.* his Wife, upon trust, that they my said Execu-

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tors, or the Survivor of them, his Executors or Administrators, shall and do call in the said Monies so to be placed out as aforesaid, and pay and equally divide the same to and amongst my five Nephews, *George Hammond, Joseph Hammond, Henry Hammond, Walter Hammond, and Francis Hammond*, in equal Proportions, Share and Share alike, as they shall severally attain their ages of twenty-one years : but in case any or either of my said Nephews shall happen to die before they or he will be entitled to the Money under this my Will, then upon trust to pay the Shares or Share of them or him so dying, unto the Survivors in equal Proportions, Share and Share alike. Then all my Real Estate or Interest in any Real Estate, Crops, Farming Stock, Implements, and Utensils in Husbandry, Household Goods, Chattels and Effects, and all other my Property whatsoever and wheresoever, after paying all my just Debts, Funeral Expences, and Charges of proving this my Will, I give, devise, and bequeath unto my said Daughter *Maria Barker*, her Heirs, Executors and Administrators." The Executors proved the Will, and the Personal Estate was more than sufficient for the payment of the Debts, &c.

The Plaintiffs, considering the Legacies of the Policies of Insurance as adeemed, filed the present Bill for an Account, and prayed that it might be declared that the Bequest of the Policies of Insurance was adeemed, and that they might have the clear Residue of the Testator's Personal Estate and Effects paid to them.

The Legatees by their Answers insisted, that, under the circumstances, the Legacies out of the Policies of Insurance were not adeemed, and were not intended to be adeemed ; and they went into evidence to show, that

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it was not the intention of the Testator to adeem the Legacies, but the Evidence was slight, and not relied upon in the Argument. The Case was argued twice.

Mr. *Horne*, and Mr. *Spence*, for the Plaintiffs;  
Mr. *Roupell*, for the Executors:—

The Legacy must be considered as adeemed. It was not a pecuniary Legacy, a demonstrative Legacy, with a Fund pointed out for payment, but *Legatum debiti*, a specific Legacy; the words being, “All my Right, Title and Interest in two Policies of Insurance,” &c. all that follows is merely a direction of Trust. The consequence is, that the Money on these Policies being received by the Testator in his Life-time, the Legacies are adeemed. The general Rule, after some fluctuation of opinion, now appears to be, that when a specific Legacy is given, and the thing given does not exist at the Testator’s Death, the Legacy is gone. In *Chaworth v. Buck(a)*, a Legacy was given of Money due upon a Note, the Note was afterwards paid to the Testator, and it was held, that the Legacy was specific and adeemed. In *Ashburner v. Macquire(b)*, a Legacy of “my 1,000*l.* East India Stock,” was held to be specific, and adeemed by a sale of the Stock by the Testator. *Hambling v. Lyster(c)*, proceeded on circumstances of Intention, not to be found in this Case; it was merely a change of one Security for another. In *Stanley v. Potter(d)*, the Bequest was similar to the present. The Testator gave to his Executors for ninety-nine years, the annual Sum payable on an Heritable Bond, in Trust to pay an Annuity thereout to his Sister. In his Life-time the Bond was paid off, and

(a) 4 Ves. 555.

(b) 2 Bro. C. C. 108.

(c) Ambler, 401; and observed upon from the Regis-

trar’s Book in *Wood v. Penayre*,  
13 Ves. 336.

(d) 2 Cox, 180.

Lord *Thurlow* held the Legacy was adeemed, and the supposed distinction between voluntary and compulsory Payments was exploded. His Lordship holding, that on a specific Bequest, the thing given must exist at the Testator's death; if gone, the Legacy is adeemed. That case is decisive of the present. The same doctrine was also held by Lord *Thurlow* in *Pulsford v. Hunter* (*d*). In *Fryer v. Morris* (*e*), there was a Legacy of Money due on a Note, and the Money so due being afterwards received by the Testatrix, and paid to a Banker, and part of the Money drawn out, the Legacy was held to be adeemed. The late *Master of the Rolls* there says, "The principle of Ademption, by receiving the thing given, is, certainly, that the thing given no longer exists; for if, after the receipt of it, it could be demanded, that would be converting it into a pecuniary instead of a specific Legacy." The same principle seems admitted in *Le Grice v. Finch* (*f*), though that was held not to be a Case of Ademption. The Legacies, therefore, in this Case were adeemed, and the Plaintiffs are entitled.

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Mr. *Fonblanque*, and Mr. *Bligh*, for the Defendants  
*Hammond* and Wife, and their Children:—

The intention of the Testator is primarily to be considered. It is not clear that the Legacies are to be considered as specific. No Legacy is considered as specific unless clearly so intended. The Policies are given to the Executors, and Legacies to the Legatees. It is a demonstrative Legacy, with a Fund pointed out for payment. In the *Attorney General v. Parkyn* (*g*), Lord *Camden* held, that if a sum due on a Bond from *A.* be given, the

(*d*) 3 Bro. C. C. 415.

(*e*) 9 Ves. 360.

(*f*) 3 Meriv. 51.

(*g*) Ambl. 566; and see

*Gillaume v. Adderly*, 15 Ves.

384; *sed vid.* *Ashburner v.*

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and *Acton v. Acton*, 1 Meriv.

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Legacy is not specific. But supposing this Legacy to be specific, it was not adeemed. In many Cases a distinction has been taken on the question of Ademption, between voluntary and compulsory payments, as in *Partridge v. Partridge* (h), *Crockatt v. Crockatt* (i), *Rider v. Wager* (k). Afterwards, in *Hambling v. Lyster* (l), which is very much in point, the rule was thus modified:—"If a Debt is specifically bequeathed, and is afterwards received by the Testator, no *reason* appearing why it was called in, the Receipt amounts to an Ademption; but if there be a reason for the Receipt, no Ademption will be effected." Here there was a reason for receiving the Amount due on the Policies. In the hands of the Insurance Office the Money would not pay Interest. No man of common prudence would have suffered it to lie unproductive; there was, therefore, a moral necessity for receiving it. In *Coleman v. Coleman* (m), the Testator gave the Interest on a Bill of Exchange, on the *East India Company*, to his Wife for life, and after her death directed it should be sold, and the Money divided amongst certain Persons. The Testator received from the *East India Company* the amount of the Bill in the usual course of Payment, and it was held not to be an Ademption. Lord *Loughborough*, alluding to what was said in the Argument, that the distinction between a voluntary and a compulsory payment was exploded, observes, "The application of the distinction may often fail extremely in the particular case; but where the Testator is compelled to receive payment of the Debt, a pretty strong presumption arises that there is no variation of intention; where he goes himself, no necessity urging him, and destroys the form of the thing specifically

(h) Forr. 228.

(i) 2 P. Wms. 164.

(k) 2 P. Wms. 328.

(l) Ambl. 401, but more fully

stated from the Registrar's  
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 13 Ves. 436.

(m) 2 Ves. jun. 639.

given, that is a good ground of argument the other way." His Lordship also states the difference between a specific thing given, or a Legacy equivalent to Money, marked with a reference to a particular Security. In *Bronsdon v. Winter* (m), there was a Bequest of 2,000 l. South Sea Stock, and two Navy Bills, and the Money due thereon to be placed at Interest for the Testator's Daughter and her Children. The Testator afterwards sold the Stock, and received the Money due on the Bills, and the *Master of the Rolls* said, "That the bequest of the South Sea Stock was pecuniary and not specific; and as to the Navy Bills, that though specifically described, the Money due thereon was given, i. e. if it should be paid before his death, that he could not help receiving it; and if the Words 'Money due thereon' had been omitted, it would make no difference." It is a general rule, that if Goods in a particular place are bequeathed, and they are removed before the death of the Testator, it is an Ademption; but if the removal is a matter of necessity, it is an exception; as where the Testator had two Houses, and only one Service of Plate, and gave all his Plate and Linen at S. and the Plate and Linen were moved from the House mentioned in the Will, the Town-house, to the Country-house, where it was at the Testator's death; still it was held the Plate and Linen passed, and that there was no Ademption (n). In *Chapman v. Hart* (o), Lord *Hardwicke* held, that if Goods on board a Ship are bequeathed, and they were afterwards removed for preservation, the Ship being leaky, or likely to founder; or if the Captain is removed to another Ship; this would not defeat the Legacy. So if Goods in a House are bequeathed, and they are removed on account of a Fire, the Legacy would still

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and others.

(m) Ambl. 57.

v. *Heseltine*, ante, 3 Vol. pa.

(n) *Land v. Decaynes*, 4 Bro. 276.

C. C. 536. See *Heseltine* (o) 1 Ves. 273.



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be good. The Cases cited of *Fryer v. Morris*, and *Stanley v. Potter*, are irreconcilable with former Authorities. In the present Case, under all the circumstances, the Legacy cannot be considered as adeemed.

The VICE-CHANCELLOR:—

As the Decisions on this question are conflicting, I will look more particularly into them before I decide this Case.

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The VICE-CHANCELLOR:—

6th Dec.

The Testator, at the making of his Will, had effected certain Policies of Assurance on the Life of his Wife, and considering that his Wife would survive him, and that the benefit of these Policies would not accrue until after his Death, he makes these Policies of Assurance the subject of Gift or Legacy by his Will. It so happened that his Wife died before him, and he received in his Life-time the amount of these Policies, and the question in the Cause is, whether the Gift or Legacy in his Will is thereby adeemed?—It cannot be contended, that in this Case there was any such setting apart the Money received, in order that it might be specially preserved for the Legatees, as would, upon the principles of the Civil Law, prevent Ademption. But it is said, that the specific character of the Gift here failed only by the accident of the Death of the Wife in the Life-time of the Testator, and that the receipt of the Money by the Testator was the unavoidable consequence of that accident, and not *animus adimendi* the Legacy, and that within the principle of *Hambling v. Lyster*, and the other cases of that class, the Legacy is not therefore adeemed. As a general principle, it is unquestionably to be stated, that if the subject of a Gift do not remain *in specie* at the Death of the Testator, the Gift is gone.

But it must be admitted, that in *Hambling v. Lyster*, and in some other Cases, there is authority for stating, that if there be a Legacy of a Debt, and that Debt be afterwards received by the Testator, that the Legacy shall still carry the amount of the Debt from the general Assets of the Testator, unless the Testator appears to have called in the Debt, with the intention to adeem the Legacy. Some of those Cases are, however, to be resolved by a different principle; that they were not considered to be specific Legacies, but were, what are called in the Civil Law, demonstrative Legacies; that is, general pecuniary Legacies, with a particular Security. In the Case of *Ashburner v. Macquire* (p), Lord Thurlow entered very fully into the consideration of all the Cases which are to be found upon this subject; and in that Case, and still more unequivocally, in the case of *Stanley v. Potter*, in Mr. Cox's Reports (q), he altogether repudiated the principle of the *animus adimendi*, as tending to inexplicable confusion; and held, that when it was once determined that the Legacy of a Debt was specific, and not demonstrative, that the only safe and clear way was to adhere to the plain rule,—that there is an end of a specific Gift, if the specific thing do not exist at the Testator's Death. It may be questionable from the Cases of *Coleman v. Coleman* (r), and *Roberts v. Pocock* (s), whether Lord Rosslyn fully adopted the principle of Lord Thurlow; but the Cases of *Fryer v. Morris* (t), and *Le Grice v. Finch* (u), before Sir William Grant, appear to me to manifest, by necessary inference, that that learned Judge considered the Law to be so settled. Taking it, therefore, as an established principle, that in the case of a specific Gift, the Court is only to inquire

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(p) Ambl. 401.

(q) 2 Cox, 180.

(r) 2 Ves. jun. 639.

(s) 4 Ves. 150.

(t) 9 Ves. 360.

(u) 3 Meriv. 51.

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whether the specific thing remains at the Death of the Testator; and cannot enter into the consideration, whether it has or not ceased to exist, by an intention to adeem on the part of the Testator, it necessarily follows, that in the present Case I am bound to declare, that the Legacy of the Policies of Assurance, being a specific Gift, has altogether failed, by the non-existence of the Policies at the Death of the Testator.

2d &amp; 19th Nov.

## THORPE v. MACAULEY.

*On a Bill for a Discovery, and a Commission Abroad in aid of a Defence to an Action for a Libel; a Demurrer was overruled, with liberty to amend the same, the Plaintiff being entitled to a Commission Abroad, though not to a Discovery from the Defendant.*

THE Bill, in substance stated, that in 1791 a Company was formed for carrying on Trade on the Western Coast of *Africa*, intitled the *Sierra Leone Company*, and was incorporated by an Act of Parliament, which passed in the 31st year of the Reign of his late Majesty Geo. III.—That the said Company formed a Settlement or Colony at *Sierra Leone*, on the Western Coast of *Africa*.—That the principal object in forming the said Company, and establishing the said Settlement or Colony, was the suppression of the Slave Trade, and the introduction of Commerce and Civilization amongst the Inhabitants of the Western Coast of *Africa*.—That the Defendant was for some years employed in the service of Mr. *M'Clond*, in the Island of *Jamaica*, to superintend a Plantation of the said Mr. *M'Clond*, called *Hyde Plantation*, in that Island; and that about the year 1791, the Defendant was dismissed from or left the Service of the said Mr. *M'Clond*, and the same year returned to *England*, when the said Defendant was taken into the service of the *Sierra Leone Company*, and was sent by the said Company to the said Colony of *Sierra Leone*, and was at one time appointed the *Judge* or *Chief Justice* of the said

Settlement or Colony, or acted in that capacity, and was afterwards appointed by the said Company *Governor* of the said Settlement or Colony.—That in the said capacities of *Judge* and *Governor*, the said Defendant continued in the service of the Company for many years, and down to the time of the dissolution of the said Company.—That in 1807 an Institution was formed under the name of the *African Institution*, for purposes similar to that of the *Sierra Leone Company*, the *Sierra Leone Company* having been dissolved.—That the Plaintiff was many years ago appointed *Chief Justice* of the said Colony or Settlement of *Sierra Leone*, and *Judge* of the *Vice Admiralty Court* there.—That in consequence of the Plaintiff holding the said Offices, he felt and took great Interest in the prosperity of *Africa* and the suppression of the Slave Trade.—That the Plaintiff in the year 1818 wrote and published a certain Pamphlet or Book regarding the Slave Trade, intitled, “A View of the present Increase of the Slave Trade, and the Cause of that Increase,” and suggested a mode for its total annihilation; and in such Pamphlet or Book is a passage in the words following, that is to say, “Let the great body of the Institution only reflect on the progress 14,000*l.* would have enabled them to make in the Civilization of *Africa*. Let them no longer sanction the most notorious facts, not contradict the most palpable truths, nor persist in asserting to-day what they asserted yesterday, in defiance of evidence and contempt of refutation, and in violation of their own acknowledgment. It is deplorable to see the littleness of vanity prevail when the pride of greatness should direct; but there is a time too late for Improvement. I shall persevere every where, while there is hope of obtaining benefit any where, yet when I read the following Resolution of thanks to Mr. *Macaulay* in their last Report, I feel almost hopeless in

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appeal. 'This Institution is highly sensible of and grateful for the important services of Mr. Z. Macauley, and thinks it right to express its sense of his deserts at a time when the purity of his motives and the integrity of his conduct has, by the Enemies of the great *African Cause*, been falsely and maliciously arraigned.' If this gentleman has been falsely and maliciously arraigned, why did not the Institution allow the full and open Investigation that was so often demanded, by which the falsehood and malignity might have been exposed and disgraced; whereas, by denying inquiry into the assertion, they have confirmed the truth of the Allegation. Only let the Institution recollect their own declared objects; they profess to be Enemies to the Slave Trade and Friends to the Civilization of *Africa*, yet how inconsistent is all this with an approbation of Mr. Macauley, who, after being taken in the *Sierra Leone Company* Service from the Service of a Planter in the *West Indies*, and sent to *Sierra Leone* a Governor, where his conduct is said to be highly instrumental in raising an Insurrection of the Settlers; after which he proposed to have the Settlement new colonized by purchasing Slaves, and working them as Slaves for the acquirement of productions in *Sierra Leone*; there while a servant to the Company he did, in violation of their rules, surreptitiously trade on his own account, and supply the most noted Slave Traders, that infested the West Coast, with assorted articles for the Slave Market; he also caused his Brother, *Alexander Macauley*, to be appointed Master of a Ship regularly in the Trade of carrying Slaves from *Africa* to the *West Indies*, in which employment he continued until *England* had abolished the Trade; then he became agent for this Mr. Z. Macauley, and in that capacity did aid and assist the Slave Trade, by purchasing the condemned Slave Vessels at *Sierra Leone*, and selling them

to the Slave Traders for the same employment; also when Mr. Z. *Macauley* removed his swarthy Brother, he appointed Mr. *Macmillan* (who has forsaken the Company's Service for the Slave Trade) as his Agent at *Sierra Leone*, so that we can show Mr. *Macauley's* connection with Slaves, the Slave Trade and Slave Traders from infancy to age, though he is incessantly preaching his abhorrence of the traffic. His exertions in cultivating and civilizing *Africa* are of the same description, he was a principal means of preventing all Cultivation at *Sierra Leone*; and though he sends more Merchandize there than all the other Traders combined, yet he is the only Trader that gives not encouragement to a reciprocal commercial Intercourse with *Africa*, for the return Cargoes are solely comprised of Government Bills or Gold Dust. From all these circumstances, we may judge of his real abhorrence of the Slave Trade, and his zeal in promoting the objects of the Institution, of the purity of his motives, and the integrity of his conduct. Let the Institution determine whether the persons who arraign, or the persons who applaud such conduct, are the real Enemies of the great *African* Cause, when we find upheld with the most unqualified approbation such conduct as we concluded the Institution (conformably with its professions) would have pronounced a culpable dereliction of principle; but this perfect inattention to the object of the Association, incontrovertibly proves that the Institution still implicitly submit to the mischievous influence of these modern Puritans, who once wedded fast to some dear falsehood, cling to it to the last."—That although such Pamphlet or Book was published in the month of January 1818, the said Defendant took no notice thereof until the month of December 1818.—That the said Defendant having discovered that the several Witnesses, by whose testimony

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Plaintiff could establish and prove the several Allegations contained in the said passage of the said Pamphlet or Book, were gone abroad and not likely to return to *England*, he the said Defendant did, in the month of December 1818, commence an Action at Law against Plaintiff in his Majesty's Court of King's Bench at *Westminster*, and declared in such Action, in or as of Hilary Term 1819, and in the first count of such Declaration the said Defendant complained of the whole of the said Passage of the said Pamphlet or Book as being, and charged the same to be, a false, scandalous, malicious, and defamatory libel of and concerning, amongst other persons and things, him the said Defendant; and in such count the said Defendant set forth the whole of such Passage of the said Pamphlet or Book in the exact words thereof, as is before set forth; and in the second and third counts of the said Declaration, the said Defendant set forth another particular part of the said Passage, and the said Defendant being aware that the several Allegations of the said Passage were all of them true, and that it was probable Plaintiff might be able to prove the whole of them, excepting the Allegation, "that while a servant of the *Sierra Leone Company*, he did, in violation of their rules, surreptitiously trade on his own account," the said Defendant made such last-mentioned Passage the sole subject or ground of the fourth or last count of the said Declaration, and laid his Damages in the said Declaration at 1,000*l.*—That by leave of the said Court the Plaintiff pleaded divers Pleas to the said Action, in justification of the several Allegations.

The Bill then proceeded with various Charges in support of the Allegations contained in the Pamphlet, and stated that a certain written Correspondence, if produced, would prove the truth of the several matters;

and that divers Witnesses who could alone prove several of the matters in question were beyond Seas, and that the Plaintiff could not safely proceed to trial without a Discovery, and a Commission for the examination of Witnesses abroad; and the Prayer of the Bill was for a Discovery, and for one or more Commissions for the examination of Witnesses residing on the West Coast of *Africa*, and other parts beyond the Sea, and for an Injunction in the mean time to restrain further proceedings at Law.

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The Defendant demurred to the Bill. "This Defendant by protestation, &c. and for cause of Demurrer, sheweth, that the said Complainant hath not in and by his said Bill of Complaint shown, that he hath, or at the time of filing his said Bill had, any right or title to the Discovery, or to the Commission or Examination thereby sought and prayed; and this Defendant hereby prays," &c.

Mr. *Bell*, Mr. *Shadwell*, and Mr. *Garrett*, in support of the Demurrer:—

We contend that the Plaintiff is not entitled to a Discovery or a Commission. If the Writing complained of were not libellous, no Discovery would be wanted; he acknowledges the Libel, and asks the assistance of this Court, a Court of Equity, to enable him to defend himself! No Rule is better established, than that a Defendant is not bound to answer as to any fact or facts whereby he *may* subject himself to a Penalty (*a*), or to discover any immoral turpitude that may degrade his Character, or has a tendency to do so (*b*). The Libel

( <i>a</i> ) <i>Harrison v. Southcote</i> , 1 <i>Atk.</i> 539. <i>Bishop of London</i> <i>v. Fytche</i> , 1 <i>Bro. C.C.</i> 98. See the Cases on this subject	collected 1 <i>Madd. Prin. and</i> <i>Prac.</i> 214. ( <i>b</i> ) <i>Brownwood v. Edwards</i> , 2 <i>Ves.</i> 245.
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states, that the Defendant encouraged the Slave Trade, if so, he acted contrary to Law, contrary to the express provisions of the Act (c) for the abolition of the Slave Trade, by which trading in Slaves is rendered penal; he is not therefore bound to discover acts, which, if they were as represented, would subject him to the penalties of the Act. That is one objection to the Bill. Another is, that there is no instance to be found of a Bill like the present, filed for a Discovery by way of defence to an Action for a Libel. The Liberty of the Press affords impunity enough to Libellers, and this Court will not encourage their mischievous Writings; on that principle this Court has more than once refused to grant an Injunction in favour of a libellous Author, whose Work has been pirated (d). A Defendant in an action for a Libel may plead not guilty, or justify on account of confidence, or by proving the truth, if he can adduce evidence for that purpose, but this Court will not lend him its assistance. In *Lord Montague v. Dudman* (e), Lord Hardwicke says, “A Bill of Discovery lies here in aid of some proceedings in this Court, in order to deliver the Party from the necessity of procuring evidence, or to aid the proceeding in some Suit relative to a civil Right in a Court of Common Law, as an Action; but not to aid the prosecution of an Indictment or Information, or to aid the Defence to it.” The Discovery, if given, might aid a Prosecution or Indictment, which in consequence of the Discovery might be instituted, and therefore the Defendant is not bound to answer. The Action does not involve any question of Property, but is founded on a *tort*. It was held in *How v. Prinn* (f), that “In offices of Profit, words that impute either defect

(c) 47 Geo. 3, c. 36, s. 1.

(e) 2 Ves. 396.

(d) See *Wolcott v. Walker*,  
7 Ves. 1, and *Southey v.*  
*Sherwood*, 2 Meriv. 437.

(f) 2 Salk. 695.

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of understanding, of ability or integrity, are actionable." This Court has no jurisdiction in cases like this, of *tort*, for which an Information would lie. The Defendant, admitting himself to be a Libeller, asks the assistance of this Court to defend himself. The Case is in principle of the utmost importance. Its novelty is an argument against it; no text authority recognizes it. Lord *Redesdale* has not adverted to such a Bill as this, as he certainly would have done, if there had been any. If this Bill be sustainable, it will follow, that whenever an Action is brought for *Criminal Conversation*, a Bill of Discovery will be filed. Various other Cases might be stated, in which the greatest inconvenience would arise if such Bills were allowed. The Libel states, that the Defendant has been connected with Slaves, the Slave Trade, and Slave Traders, from infancy to age; how is such a Charge, including a whole Life, to be answered? The Plaintiff does not state in his Bill who his Witnesses are, or what they can prove. If the Demurrer be good as to the Discovery, it is good also as to the Commission prayed for the examination of Witnesses. The Court of Common Law, where the Action is brought, would in a proper case stay the Action until Witnesses abroad were examined. This Court only grants a Commission abroad where Property is concerned. If he is entitled to a Commission only, and not to a Discovery, the Bill should have been framed for that purpose solely. The Demurrer, under all the circumstances, ought to be allowed.

Mr. *Wetherell*, Mr. *Horne*, and Mr. *Wakefield*, in support of the Bill:—

In the Case of a Prosecution *criminaliter*, for a Libel, a Bill of Discovery would not lie, but when an Action is brought in respect of a Libel, and the Party chooses

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to treat it as a civil Injury, and seeks Damages in a civil Action, all the consequences follow, and a Bill of Discovery is maintainable. There is a Case in *Equity Cases Abridged* (*f*), where a Discovery was allowed in favour of a Person against whom an Action had been brought for running down a Ship. That Case it may be urged, is a personal *tort* regarding Property, but we shall cite Authorities which are clear of that objection, they being Cases of personal *tort*, unconnected with Property. Is however this Case wholly unconnected with Property? The Plaintiff has a Copyright in the Pamphlet which the Defendant arraigns as a Libel; if it be a Libel, the Plaintiff will have no protection for his Copyright in this Court, as was held in the Cases alluded to in the argument for the Defendant; any man might print the Plaintiff's Work with impunity. The Plaintiff's Property in his Work is endangered, by the endeavour to prove the Pamphlet a Libel; and it is not true, therefore, as represented, that the Action is for a personal *tort* merely, unconnected with property. It is said, the Bill must be taken to admit that the Plaintiff has written a Libel. These Persons had Disputes; both resorted to the Press. The Compositions of the Defendant were as libellous as those of the Plaintiff are supposed to be. It may be true, that unexplained and unjustified the Pamphlet of the Plaintiff is a Libel; but truth is a justification of a Libel: all the Judges of *England*, when consulted on the Libel Bill (*g*), stated that to be the Law. The Bill is filed for the purpose of ascertaining the truth, and to support the Pleas in justification; and the Defendant does not exhibit himself in a very favourable point of view, by putting in a Demurrer in order to deprive the Plaintiff

(*f*) *Heathcote v. Fleet*, 1 Eq. Cas. Abr. 76, c. 7; S. C. 2 Vern. 442.

(*g*) 32 Geo. 3, c. 60.

of the means of adducing evidence to prove the truth of what he has written. If the Defendant's Character is invulnerable, what has he to fear from a Discovery, or a Commission? Innocence courts inquiry, and disdains to steal a triumph. There are Cases, where on an action founded on a personal *tort*, a Bill of Discovery has been allowed; the cases in point are but few, but they are of the very highest authority. *Cogamant v. Verelst* (*g*), and *Nichol v. Verelst* (*h*), determined by the House of Lords, are decisive in support of the Bill. In those Cases, an action was brought for an Assault and false Imprisonment, in respect of matters for which an Indictment might have been resorted to, and yet a Bill of Discovery was allowed.

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A Discovery has been enforced of a promise of Marriage in aid of an Action for a breach of the Promise (*i*). That is a *tort*. Actions *ex delicto* are Case—Trover—Detinue—Replevin—Trespass—and in all such cases, cases founded on *tort*, a Bill of Discovery it is apprehended will lie in aid of a Defence. If a man digs a Ditch in a Highway into which another falls; an Action lies (*k*). If a Parishioner be excluded from the Vestry Room, an Action lies (*l*); and so it will for infringing a Copyright (*m*); for destroying ancient Rights (*n*); for running down a Ship (*o*); for occasioning a Fire by negligence; for overturning a Coach; for keeping loose a ferocious Dog which does an Injury; all these are Actions founded upon *torts*: and is it to be said that the Plaintiff in these cases is not entitled to a Bill of Discovery to

(*g*) 4 Bro. P. C. 407.

(*h*) Ibid. 426.

(*i*) *Vaughan v. Aldridge*,  
Forrest's Rep. 42.

(*k*) 1 Roll. Abr. 88. *Butterfield v. Forrester*, 11 East, 60.

(*l*) *Phillibrown v. Ryland*,

1 Str. 624.

(*m*) Chitty on Pleading, 141.

(*n*) Ibid. 142.

(*o*) Ibid. 126.

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aid him in the prosecution of his Action, or that the Defendant is not entitled to it in aid of his Defence? It is one of the greatest advantages of a Court of Equity, that it enables Persons in such cases to obtain a Discovery which may be used as evidence, and without which a party might be subjected to the greatest injustice. It has justly been observed on the other side, that the principle upon which this Case must be decided is of the utmost importance. Innocence will have nothing to fear; Guilt alone can wish to narrow the jurisdiction of this Court in such cases. If a man with two modes of proceeding before him, a criminal Indictment and a civil Action, chooses to resort to the latter, and call for large Damages, he must take the consequence. If he subjects himself to a Discovery, it is his own fault. If by resorting to a civil Action he wishes to vindicate his Character, he will fail in his purpose, if he precludes the Defendant from the means of defending himself. Though a Discovery by the Defendant may be injurious to his Character, it does not prevent a Discovery; it was so held recently, in *Parkhurst v. Lowten* (*p*). If it were not so, a Defendant might refuse to answer as to a Fraud, for all Frauds are injurious to character. As Mr. *Fonblanque* observes (*q*), "To compel a Defendant to discover that which may enable the Plaintiff in Equity to substantiate a just, and to repel an unjust demand, is merely assisting a right or preventing a wrong." Questions are asked by this Bill which are not of a criminatory nature; those should be answered: the Demurrer, therefore, covers too much.

The VICE-CHANCELLOR:—

19 Dec.

The Plaintiff, Dr. *Thorpe*, has filed this Bill against the Defendant Mr. *Macauley* for Discovery, and also for

(*p*) 1 Meriv. 400.      (*q*) Treatise of Equity, 2 Vol. 479.

a Commission to examine Witnesses abroad, in order to aid his Defence, at Law, to an Action brought against him by the Defendant *Macauley* for a Libel.

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The Defendant has put in a general Demurrer, as well to the Discovery sought as to the Commission.

The alleged Libel is contained in a Pamphlet admitted to be published by the Plaintiff Dr. *Thorpe*; and the purport of it may be shortly stated thus:— That Mr. *Macauley* being the Chief Justice and Governor of the *Sierra Leone Company*, the object of whose Institution was to civilize *Africa*, and suppress the Slave Trade, had betrayed his duty by obstructing the Civilization of *Africa*, and by promoting the Slave Trade for his own private Emolument, and had further carried on a surreptitious Trade in violation of the Rules of the Company.

To the Action at Law brought by Mr. *Macauley*, Dr. *Thorpe* has pleaded a justification, founded upon the alleged truth of the Libel, and the object of the present Bill is to establish that justification.

It is not denied that the conduct charged upon Mr. *Macauley*, in the execution of these public offices, amounts to a Misdemeanor, and that he is not bound to answer so as to criminate himself; but it is said, that there are many questions asked in the Bill which are not of a criminatory nature, and that this Demurrer extending to the whole Bill, covers too much.

The sole object of the Bill is to prove the truth of the Libel; or, in other words, to prove the truth of the criminal matter charged. Every question asked must necessarily be with a view to that end and tend to that point, and a Party is not bound to answer any question,

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however apparently indifferent, which is in any manner connected with the criminal charge. I am of opinion, therefore, that the Plaintiff is not entitled to any Discovery from the Defendant.

The remaining consideration is, whether the Plaintiff is entitled to a Commission for the Examination of his Witnesses abroad, to which the Demurrer also extends? It has been urged, that the Commission is incidental only to the Discovery, and that where the Court gives no Discovery it will grant no Commission. The case of the *Earl of Suffolk v. Green (r)*, is a direct authority the other way. That was a Bill for a Discovery, and to perpetuate the testimony of Witnesses as to a Bond being usurious; Lord *Hardwicke* held, that the Demurrer would have been good if confined to the Discovery, but bad because it extended also to the Commission. There is no difference in principle between perpetuating the testimony of Witnesses, and examining Witnesses upon Commission.

It was next argued, that a Court of Equity would not lend its aid either for Discovery or Commission, to either Party in an Action at Law, proceeding *ex delicto*. I cannot but consider the cases of *Cogamant v. Verelst*, and *Nichol v. Verelst*, in Mr. *Brown's* Parliamentary Cases, as being some authority the other way.

It did not occur to the very distinguished Counsel who were employed in those Causes that any such point could be sustained. No such limitation of the jurisdiction as to Discovery is hinted at in any book of practice, or by the *dictum* of any Judge.

Courts of Equity exercise a direct jurisdiction in matters of Waste and public Nuisance, which are *ex*

(r) 1 *Atkins*, 450.

*delicto*. I am not therefore prepared to say, that a Court of Equity will refuse its ordinary aid to the Parties, in any Action at Law, proceeding for a civil remedy.

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The last objection made was, that the Plaintiff by his Bill admitted himself to be the Author of the Libel; that the Libel, whether true or false, was an indictable offence; and that the Plaintiff therefore, by his own showing, came to this Court to protect him against the consequences of his crime.

I think there is no weight in this objection. Mr. *Macauley*, by his Action at Law, thinks fit to treat the conduct of Dr. *Thorpe* as a civil Injury only, and it is but just that the same course of defence should be open to Dr. *Thorpe* which is open to other Defendants in civil Suits.

I am of opinion, therefore, that the Plaintiff is entitled to the Commission, though not entitled to the Discovery, and following the course of Lord *Hardwicke*, in the case of *Suffolk v. Green*, I should over-rule the Demurrer, giving liberty to the Defendant to insist by Answer, that he is not bound to make the Discovery; considering, however, that a difficulty may arise in this respect out of the modern practice, that a Party who submits to answer must answer fully (s), let this Demurrer be over-ruled, with liberty to the Defendant to file such other Demurrer as he may be advised.

(s) See *Mazarredo v. Maitland*, 3 Madd. Rep. 70;—*v. Harrison*, 4 Madd. Rep. 252. It seems, however, that though in general a Defendant, if he answers at all, is bound to answer fully, yet where his Answer may subject him to a pain, penalty, or forfeiture, he may by his Answer refuse to answer as to such criminal matter. See *Curzon v. De la Zouch*, 1 Swanst. 192; *Attorney General v. Brown*, Ibid. 305. Many preceding Cases are to the same effect.



*Original Bill,*

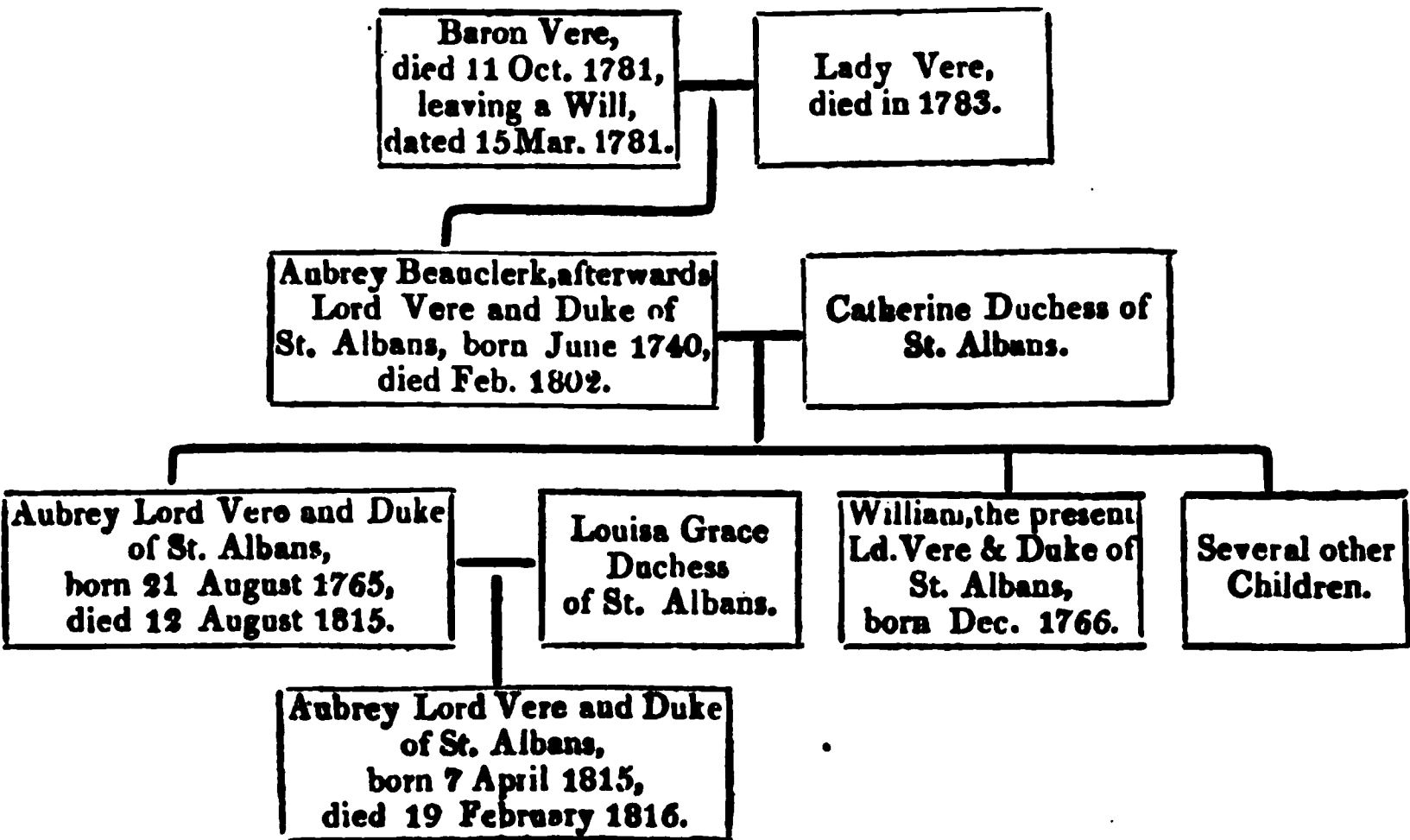
Between the Most Noble AUBREY, Duke of SAINT ALBANS, an Infant, by the Right Hon. LOUISA MANNERS, commonly called Lady LOUISA MANNERS, his Grandmother and next Friend, Plaintiff;  
and  
LOUISA GRACE, Duchess of SAINT ALBANS, ANDREW BERKELEY DRUMMOND, JOHN DRUMMOND, and CHARLES DRUMMOND,  
Defendants.

*Bill of Revivor and Supplement,*

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23d, 25th, &  
27th Nov.

Between the Right Honourable GEORGE WILLIAM COVENTRY, commonly called Viscount DEERHURST, and the Right Hon. MARY COVENTRY, commonly called Lady MARY DEERHURST, his Wife - - - - - Plaintiffs;  
and  
ANDREW BERKELEY DRUMMOND, JOHN DRUMMOND, and CHARLES DRUMMOND, and LAURA MANNERS, and the Most Noble WILLIAM, Duke of SAINT ALBANS, Defendants

PEDIGREE.



**T**HE original Bill stated, that by an Indenture of four Parts, dated the 6th June 1687, between *Ellen Gwyn*, of the Parish of *St. Martin-in-the-Fields*, in the County of *Middlesex*, Spinster, the Right Honourable *Lawrence Earl of Rochester*, and *William Chiffinch*, Esq. of the First Part; *Sir John Masters*, of *Hornsey*, in the County of *Middlesex*, Knight, *Charles Masters*, of the *Inner Temple*, *London*, Esq. and *Anthony Keck*, of *London*, Gentleman, of the Second Part; The Most Noble *Charles Duke of St. Albans*, the paternal Ancestor of Plaintiff, of the Third Part; and the Right Honourable *Henry Lord Dover* and *Sir Stephen Fox*, Knight, of the Fourth Part; all that the Manor or Lordship of *Bestwood Park*, and the Messuages Lands, Tenements and Hereditaments thereunto belonging, and in said Indenture more particularly described, were limited, conveyed, settled and assured unto and to the use of *Ellen Gwyn*, long since deceased, for her Life, with Remainder to the use of said *Charles*, then Duke of *St. Albans*, for ninety-nine years, if he should so long live, with Remainder to the use of his first and other Sons in Tail Male, with divers Remainders over, and with the ultimate Remainder or Reversion to the use of his late Majesty King *Charles the Second*, his Heirs and Successors forever.—That under and by virtue of said Indenture, and the Limitations contained therein, the said *Charles Duke of St. Albans*, after the death of said *Ellen Gwyn*, entered into Possession of the said Manor or Lordship, Lands and Hereditaments, and enjoyed the same to the time of his Death, and since his Death the same have been possessed or enjoyed by the Descendants of said Duke;

Lord Vere bequeathed certain Chattels to Trustees in trust for his Wife for Life, then to his Son for Life, “and after the decease of the Survivor, in trust for such Person as should from time to time be Lord Vere; it being my will and intention that the same should, after the decease of my Wife, go and be held with the Title of the Family, as far as the Rules of Law and Equity will permit.”

The Testator at his death left his Wife and Son surviving, and also two Children of his Son. The Wife and Son died. The eldest Grandson afterwards died leav-

ing issue a Son, who died under twenty-one, the second Grandson being still living.

Held, that it was a direct Gift of the Chattels, and not an Executory Trust; and that the Son and eldest Grandson took only for Life, and that the Great-grandson, deceased, took the absolute Interest.

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and the said Manor, Estate and Hereditaments were vested in the Plaintiff, as Tenant in Tail Male, under and by virtue of the Limitations in said Indenture contained.—That by Letters Patent under the Privy Seal of *England*, bearing date the 5th July in the third year of the Reign of his late Majesty King *James* the Second, his said late Majesty, for divers good Causes and Considerations him thereunto moving, did, of his especial Grace, give and grant unto said *Charles* Duke of *St. Albans*, and to the Heirs Male of his Body, lawfully begotten, the Office or Offices, Place or Places of Master Surveyor or Keeper of the Hawks of his said Majesty, his Heirs and Successors, together with all such and the same Fees, Allowances, Profits, Privileges and Advantages whatsoever as were then belonging thereto, or held and enjoyed therewith, and which were in said Letters Patent more particularly mentioned.—That the said Office or Offices of Master or Keeper of his Majesty's Hawks, was or were held and enjoyed, and the Profits and Emoluments thereof were taken and received, by said *Charles* Duke of *St. Albans* and his Heirs Male, and the same were vested in the said late infant Plaintiff until his Death, as Tenant in Tail Male thereof, under and by virtue of said Letters Patent or Grant.—That said Duke of *St. Albans*, the said late infant Plaintiff's said late Father, died on the 12th August 1815.—That said late Duke of *St. Albans* died, leaving said *Louisa Grace*, Duchess of *St. Albans*, his Widow, and the said infant Plaintiff, his only Child and Heir-at-Law.—That the Right Honourable *Vere* Lord *Vere*, in and by his last Will and Testament, bearing date the 11th October 1781, (amongst other things) gave and bequeathed unto *James* Earl of *Abercorn*, *Robert Drummond*, and *Thomas Walley Partington*, all his Household Goods, Furniture, Pictures, Books, Linen, China and Glasses, which should be at his Decease in his

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Mansion House at *Hanworth*, in the County of *Middlesex*, or in any of the Offices belonging to the same; and also all such Silver and Gilt Plate as he should be possessed of at his decease, whether at *Hanworth* or in *London*; upon trust to permit and suffer his Wife, *Mary Lady Vere*, to have the Use and Enjoyment of the same during her Life, and from and after her Decease to permit and suffer his said Testator's Son, *Aubrey Beauclerk*, to have the Use and Enjoyment thereof during his Life; and after the decease of the Survivor of them, the said Lady *Mary Vere* and *Aubrey Beauclerk*, the said Testator directed that his said Trustees should be possessed of the same Goods, Furniture, Pictures, Books, China, Linen, Glasses and Plate, in Trust for such Person as should from time to time be Lord *Vere*; it being said Testator's will and intention that the same should, after the decease of his said Wife, go and be held and enjoyed with the Title of the Family, so far as the Rules of Law or Equity would permit. And said Testator, Lord *Vere*, gave and bequeathed unto said Earl of *Abercorn*, *Robert Drummond* and *Thomas Walley Partington*, their Heirs, Executors, Administrators and Assigns, all such his principal Monies as, at the time of his Death, should be invested or laid out in real, personal, government or other Securities, in India Bonds, Navy Bills, or in any of the public and parliamentary Funds, upon trust after his Decease to make sale of such of the said Securities and Funds, as were in their nature saleable; and to call in the Monies placed out on such Securities, as were not saleable; and by and out of the Monies to arise thereby, to pay certain sums of Money in said Will mentioned; and as to the residue of the Monies to be so produced, as aforesaid, the said Testator directed that said *James Earl of Abercorn*, *Robert Drummond* and *Thomas Walley Partington*, their Executors, Administrators and Assigns, should lay out or invest

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the same in the purchase of Freehold or Copyhold Lands, Tenements and Hereditaments, in Fee Simple, and convey, limit, surrender and assure the same to the use of his said Testator's said Wife, *Mary Lady Vere*, for Life, without impeachment of Waste; with Remainder to the use of Trustees in the settlement of said Lands and Hereditaments to be named, in trust to preserve contingent Remainders; with Remainder to the use of said *James Earl of Abercorn, Robert Drummond and Thomas Walley Partington*, for a term of one hundred years, upon certain Trusts therein mentioned, and long since performed and satisfied; with Remainder, after the determination of said Term, to the use of his said Testator's said Son *Aubrey Beauclerk*, and his Assigns, for Life, without impeachment of Waste; with Remainder to the use of said Trustees, in trust to preserve contingent Remainders; with Remainder to his said Testator's Grandson, *Aubrey Beauclerk*, the said late Plaintiff's said late Father, deceased, for his Life, without impeachment of Waste; with Remainder to Trustees to preserve contingent Remainders; with Remainder to the use of the first, second, third, fourth, fifth, and all and every other the Sons of the Body of his said Grandson, *Aubrey Beauclerk*, severally, successively, and in Remainder, one after the other, and of the several and respective Heirs Male of the Body and Bodies of such Son and Sons, lawfully issuing; with Remainder to the use of his said Testator's Grandson, *William Beauclerk*, second Son of his said Testator's Son, *Aubrey Beauclerk*, and his Assigns, for and during the Term of his natural Life, without impeachment of Waste; with Remainder to Trustees, to preserve contingent Remainders; with Remainder to the use of the first, second, third, fourth, fifth, and all and every other the Son and Sons of the Body of his said Grandson, *William Beauclerk*, severally, successively and in Remainder, one after

the other, and of the several and respective Heirs Male of the Body and Bodies of such Son and Sons lawfully issuing, with divers Remainders over; and the Testator appointed his Wife, *Mary Lady Vere*, and Lord *Charles Spencer*, Executors of his Will.—That said *Mary Lady Vere* and Lord *Charles Spencer* duly proved the Will of said Lord *Vere* in the proper Ecclesiastical Court, and took upon themselves the execution thereof; and they shortly afterwards assigned to said *James Earl of Abertorn*, *Robert Drummond* and *Thomas Walley Partington*, the Trustees in the Will named, the Household Goods, Furniture, Pictures, Plate, Linen, China, and other things so bequeathed to them, in Trust as aforesaid; and they, the Executors, also collected and converted into Money, the Bonds, Bills, Stocks, Securities and other the Personal Estate of said Lord *Vere*; and after appropriating such parts thereof as in the Will directed, they accounted for, and paid over and assigned, the Residue thereof to said *James Earl of Abertorn*, *Robert Drummond* and *Thomas Walley Partington*, as such Trustees, as aforesaid, who invested the same in various Securities, at Interest, but did not lay out the same, or any part thereof, as it is alleged, in the purchase of Freehold or Copyhold Estates.—That said *Robert Drummond* survived his Co-Trustees, the said *James Earl of Abertorn* and *Thomas Walley Partington*; and in or about the month of January, in the year 1804, the said *Robert Drummond* died, having duly made his Will, and appointed his Sons, *Andrew Berkeley Drummond*, *John Drummond* and *Charles Drummond*, his Executors, and they duly proved said Will; in whom said Furniture, Plate, China, Pictures and other things, and the said Funds and Securities arising from the Personal Estate of said Lord *Vere*, are now vested, upon the Trusts of his Will.—That upon the death of said Lord *Vere*, the

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title of said Lord *Vere* descended upon said *Aubrey Beauclerk*, the Son of said Lord *Vere*, and from him passed to said late Duke of *St. Albans*, the said Infant Plaintiff's said late Father, deceased; and said Furniture, Plate, Pictures, China and other things, were enjoyed by said *Aubrey Beauclerk*, and by Plaintiff's said late Father, successively, as Lords *Vere*, under the said Will: but on the death of said late Plaintiff's said late Father, said Furniture, Plate, Pictures, China and other things, became as said late Plaintiff was advised, his absolute Property.—That the Monies arising from the Residue of the Personal Estate of the said Lord *Vere*, were never laid out or invested by his Trustees, in the purchase of Lands of Inheritance, but the same were invested in Stocks, Funds and Securities, at interest, in the name of the Trustees for the time being of said Will, and the Dividends and Interest thereof were paid to the late Plaintiff's late Father, during his life, as Tenant for life thereof, and of the Estates to be purchased therewith, under said Lord *Vere*'s said Will.—That the said *Aubrey*, Duke of *St. Albans*, the late Plaintiff's Father, deceased, died on the 12th of August 1815, having duly made his Will, and appointed his Wife, the said *Louisa Grace*, Duchess of *St. Albans*, the said late Plaintiff's Mother, Executrix thereof.—That on the death of his said Father, said late infant Plaintiff became Tenant in Tail Male of said Stocks, Funds and Securities arising from the Residue of the Personal Estate of said Lord *Vere*, and of the Lands and Hereditaments to be purchased therewith, under the Trusts of his said Will; and said late Plaintiff being entitled in manner hereinbefore mentioned, and being an infant under the age of twenty-one years, was desirous that the amount of his aforesaid Property should be ascertained and properly secured,

for his benefit, during his Minority ; and that a proper Person should be appointed to manage and conduct his said Estates, and to receive the Rents and Profits thereof; and that a proper Person should be appointed the Guardian of the said late Plaintiff, during his Minority; and that an Allowance should be made to such Person out of the Rents, Dividends and Profits of the Plaintiff's Fortune, for his Maintenance and Education ; and that the Dividends and Interest of said Stocks, Funds and Securities, then standing in the name of said *Andrew Berkeley Drummond, John Drummond and Charles Drummond*, as the Representatives of the surviving Trustee, named in the said Will of said Lord Vere, should be secured for his benefit during his Minority.

The *Prayer* of the Bill was, that an account might be decreed to be taken of all and singular the Real and Personal Estates, Offices and Property to which the said late Plaintiff was or might become entitled, under or by virtue of the several Deeds, Instruments, and Wills hereinbefore mentioned, or in any other manner, or by any other means, and of the Rents, Interests, Dividends, Profits and Emoluments thereof; and that all necessary inquiries and accounts might be made and taken under the decree and directions of the Court, for ascertaining the nature and amount of the said late Plaintiff's Property, and that the same, when ascertained, might be properly secured for the benefit of the said late Plaintiff, during his Minority; and that a proper Person might be appointed by the Court to manage said Estates, Offices and Property of the said late Plaintiff, and to receive the Rents, Interest, Dividends, Profits and Emoluments thereof, and to account for and pay the same into Court, in the usual manner; and that it might be referred to one of the *Masters* of

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the Court to approve of a proper Person to be the Guardian of the said late Plaintiff, during his Minority, and also, to approve of a proper sum of Money to be allowed to such Guardian, out of the Fortune and Property of Plaintiff, for his Maintenance and Education, during his Minority; and that all necessary directions might be giving for effecting the purposes aforesaid.

The Bill of *Revivor* and *Supplement* stated, that on the 20th November 1815, the *Lord Chancellor* appointed a Receiver, and that a Guardian had been appointed, and a Maintenance allowed, and that the Duke of *St. Albans* died on the 19th February 1816 intestate, under twenty-one, without having been married, and in the lifetime of his Mother, leaving the Plaintiff, Lady *Mary Deerhurst*, his Sister of the half-blood, and his Mother, who survived him only a few hours, his only next of Kin.—That the Plaintiff, Lady *Mary Deerhurst*, had administered to the late infant Duke, and that under the Indenture of the 6th of July 1687, and of the Letters Patent of *James* the Second, and of Lord *Vere*'s Will, she is entitled to such parts of the Rents and Profits of *Bestwood Park*, and of the Salaries, Fees, Profits and Emoluments of the office of Keeper of the Hawks, and of the Interest, Dividends and Profits of the Personal Estate of Lord *Vere*, directed to be laid out in Land, as have accrued due between the death of the Father of the late Duke, and the late Duke's Death, and which were not applied for his Maintenance: and submitted, that *Bestwood Park* and Premises, and the office of Master of the Hawks, or the Profits or Emoluments thereof, are not subject to the right of Dower of the late Duchess of *St. Albans*; and also submitted, whether as such personal Representative of the late infant Duke, she is not absolutely entitled to said Furniture, Plate,

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Pictures, China, and other things mentioned in Lord Vere's Will; and the Plaintiff, Viscount *Deerhurst*, in right of Lady *Mary*, his Wife, claimed to be beneficially entitled to a Moiety of the Personal Estate and Effects of the late Duke of *St. Albans*, together with the late Duchess of *St. Albans*, his Mother, the Plaintiff Lady *Mary* being, as before stated, the Sister by the half-blood of the late Duke, and together with the late Duchess of *St. Albans*, his Mother, the only next of Kin of the said late Duke.—That the Defendant, the present Duke of *St. Albans*, claims as Tenant in Tail in the possession of the Barony of *Vere*, to be entitled under and by virtue of Lord Vere's Will, to the Goods, Furniture, Books, &c. by such Will directed to go and be held with the Title of the Family, so long as the rules of Law and Equity will permit.—That the late Duchess of *St. Albans*, by her Will, appointed her Sister, *Louisa Manners*, sole Executrix, who proved the same.

The Trustees under Lord Vere's Will, by their joint and several Answer to the original Bill, and to the Bill of Revivor and Supplement, stated amongst other things, that in 1795 the then Trustees, at the request of the then Duke of *St. Albans*, sold the Household Goods, Furniture, Linen, China and Glasses, and some of the Pictures bequeathed by Lord Vere, and invested the produce in the purchase of Stock, which had since been varied, and that 928 l. 6s. 5d. four per-cent. Annuities, was standing in the names of the Defendants; and that the Plate and such of the Pictures as were still remaining, (some having been burned by a Fire which happened at *Hamworth House*, the Residence of the Duke of *St. Albans*, the Son of Lord Vere), are in the possession of the Defendant, *Laura Manners*, who claimed the same as the personal Representative of the Duke of *St. Albans*,

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the Father of the late infant Duke.—That the Dividends which accrued upon the 928*l.* 6*s.* 5*d.* four per-cent. Annuities, prior to the 12th August 1815, the day of the death of the Duke of *St. Albans*, the Father of the late infant Duke, were accounted for to his personal Representatives, and the subsequent Dividends were in the hands of the Defendants.—That they have paid to the Plaintiff, Lady *Mary Deerhurst*, as the Administratrix of the late infant Duke, the Interest and Dividends which accrued between the death of his Father and his own Death, upon the Funds directed by the Will of Lord *Vere* to be laid out in Lands, except the Interest upon several Sums, amounting together to 2,000*l.* secured upon certain Tolls, which had not been received when the Dividends were accounted for, and which they were ready to pay as the Court should direct.

The Defendant, *Louisa Manners*, by her *Answer*, submitted, that the late infant Duke of *St. Albans* did not, upon his Father's Death, become absolutely entitled, or at all entitled to the Plate and Pictures, and to the produce of the Furniture, China, and other things, but that the same vested in his Father, the preceding Duke, as his absolute Property, and now belongs to the Defendant, as his personal Representative; and further submitted, that upon the death of her Husband, the late Duchess of *St. Albans* became entitled to Dower out of the *Bestwood* Estate, and also out of the Salaries, Pensions and Allowances annexed to the office of Master of the Hawks, the Duke her Husband being Tenant in Tail of such Estate and Office; and that Defendant as Representative of the Duchess, is entitled to one-third part of the Rents and Profits of the Estate, and of the Salaries, Pensions and Allowances annexed to the Office, which accrued between the death of the

Duchess and of the Duke, her Husband; and the Defendant claimed to be entitled to all the Furniture, Plate, Linen, &c. bequeathed as aforesaid by Lord Vere, or the produce of such part as had been sold; and further submitted, that as the late Duchess, the Mother of the late infant Duke, and the Plaintiff, Lady Mary Deerhurst, his Sister of the half-blood, were the sole next of Kin of the late infant Duke, the late Duchess was entitled to a moiety of all the personal Property of her Son the late Duke, and that the Defendant as her Representative is entitled thereto. The Prayer of the Bill was accordingly.

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The Defendant, the Duke of *St. Albans*, by his *Answer*, insisted, that on the death of the Plaintiff's late Father, the Furniture, Plate, Pictures, &c. did not, under the Will of Lord Vere, become the Property of the late infant Duke.—That the Defendant was alive at the time of Lord Vere's Will, and that the Trusts of said Furniture, Pictures, &c. were executory; and that if the Trusts thereof had been properly declared at the death of Lord Vere, they would have been so declared as not to give an absolute Interest in said Chattels to the late infant Duke, in the event which has, happened of his dying under the age of twenty-one years, without Issue; and that as Tenant in Tail in possession of the Barony of Vere, he is at least entitled to the same for his Life.

Mr. Sugden, and Mr. Romilly, for the Plaintiffs:—

This Cause comes on upon an original Bill, and a Bill of Revivor and Supplement. Lord Deerhurst, the Plaintiff in the latter Bill, in right of his Wife, the Half-Sister of the late Duke of *St. Albans*, the Plaintiff in the original Bill, to whom she has administered, claims the Furniture, Plate, &c. in dispute, and to this point the Argument may be confined, for the questions as to

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Dower are not ripe for decision, until the *Master* has made his Report.

The question now to be discussed is, upon the Will of Lord *Vere*. The Will was made in March 1781, and he died in October following. At his death he had Issue living, viz. *Aubrey* Lord *Vere*, afterwards Duke of *St. Albans*, born in 1741, who was alive at the date of the Will, who had Issue a Son, born in 1765, and another Son, the present Duke of *St. Albans*, born in 1766, who was also living at the date of the Will, so that the Testator had one Son and two Grandsons living at the date of his Will. [Stated the Will of Lord *Vere*]. There are three Claimants of this Furniture, Plate, &c.; 1st, the personal Representatives of the Father of the late Duke; 2dly, the Representatives of the late Duke, for whom we appear; and, 3dly, the present Duke.

The Will expressly gives the Furniture, Plate, &c. in question, to Lady *Vere* for Life, and it gives it in equally express terms to his Son, afterwards Duke of *St. Albans*, for Life, and then does not give it to his Grandson expressly for Life, but describes him and all the other Persons as should be Lords *Vere*, it being his intention that it should go and be held with the Title of the Family, as far as the Rules of Law and Equity would permit; and therefore it is contended by the Representatives of the Grandson of the Testator, that he took an absolute Interest in this Property. We, however, who are the Representatives of the first Son of the Grandson, who was Tenant in Tail of the Barony, and also of the Property given by the Will, claim it under the General Rule, as having vested absolutely in us. The present Duke claims it as being one of the Grandsons of the Testator, the late Duke of *St. Albans*

having died under twenty-one without Issue; as if the Gift were absolutely to him, his Executors, &c. It is impossible that any weight can be given to the Claims of the Representatives of the Father of the late Duke a Grandson of the Testator; he could only be entitled under the Will to an Estate for Life. The Testator has not in words said he should take only for Life, but he has appointed Trustees, and after giving it to his Wife for Life, and taking the first Line of Generation, he has included the Grandson and others under the general Gift, and under that general Gift the Court cannot say that the Grandson should have an absolute Interest, which would have the effect of striking out of the Will, the Clause "in trust for such Person as should from time to time be Lord Vere, as far as the rules of Law and Equity will permit." The Court will not strike that Clause out of the Will, and substitute a Gift to his Grandson, his Executors, &c. The Grandson was *in esse* at the time of the Will, and might have been made Tenant for Life; and it is clear from the Clause before adverted to, as well as other parts of the Will by which he ties up the Estate, and gives only a Life Interest to him, that he was intended to take the Furniture, Plate, &c. only for Life. The Grandson and the Son take a like Interest in the Property. The Court is bound to consider what was the Testator's intention, and to give it effect so far as it does not violate any Rule of Law. Every Person *in esse* may be made Tenant for Life; and therefore this Grandson, who was *in esse* at the time of the Will, must be considered as Tenant for Life only of the Furniture, Plate, &c. which it is evident was intended to go with the Title of Lord Vere, as long as the rules of Law and Equity would permit. The great Grandson was clearly Tenant in Tail of the Barony, and he was not *in esse* at the date of the Will; and although the Testator's inten-

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tion perhaps was that he should take the Furniture, Plate, &c. only for Life, no case warrants the Court in giving effect to that intention. It is settled, there can be no Gift over of Chattels, after a Gift in Tail. The late Duke, therefore, took an absolute Interest, which is now in part vested in the Plaintiffs. It will be contended that the Court will, in favour of the Testator's intention, cut down the Limitation, in case the Tenant in Tail dies without Issue, but that never has been done; the Cases are against such a construction. In *Gower v. Grosvenor* (b), Sir Richard Grosvenor devised his Real Estate to Sir T. Grosvenor for Life, without impeachment of Waste, Remainder to Trustees to preserve, &c. Remainder to his first and other Sons in Tail Male; and there was this Clause, "My will is, that my Plate, Jewels, Library of Books, and Furniture of my Mansion Houses in ———, and my Dwelling House in *Westminster*, shall go as Heir-looms, as far as they can by Law, to the Heirs Male of my Family successively, as my Real Estate hereby settled." The question was, how far those Words authorized this Court to settle these Heir-looms, the Father being Tenant for Life, and dying without Issue. It was decided, that as there was no Issue of Sir Thomas that ever came in esse, the Limitation over took effect. There is a great chasm in the case, and it seems imperfectly reported, but that appears to have been the point decided. Lord Hardwicke certainly considered that the words "as far as they can by Law," rendered the Bequest executory, and gave the Court that latitude which belongs to executory Trusts: the present Point did not arise there. The next case is *Trafford v. Trafford* (c), in which, after a limita-

(b) Barnard, 54. Another, and a better Report of this important Case, is given from

a MS. Note, *post*, p. 337, &c.

(c) 3 Atk. 347.

tion of the Real Estate, the Testator bequeathed "all his Plate, Books, Pictures, and Household Goods, of what nature soever, to such male Person, when he should attain twenty-one, who should then be entitled to the Trust in possession of the Real Estate therein before devised; and directed that till such male Person should attain twenty-one, the said Plate, Books and Household Goods should be kept at *Dunton Hall*." Lord *Hardwicke* held, that "such male Person, when he should arrive at twenty-one," did not refer to the Tenant for Life, because that could not be the intention, and so far, that Case is an Authority against the Persons who claim this Property, as having vested in the first Person; but he was of opinion, that belonging to a Person who took the Real Estate, they ought to go as Heir-looms. It will be said, perhaps, this Case proves that the Limitation may tie up the Property until the first Tenant in Tail attains twenty-one. There is no objection, certainly, to that, if the Testator clearly means and expresses that Contingency. In that Case the Testator meant and expressed that, but without a clear intention the Court will not give that construction. In *Foley v. Burnell* (d), Lord *Loughborough* says, "The Cases that have been cited are *Levison v. Grosvenor*, and *Trafford v. Trafford*; they are both very inaccurately reported. In *Levison v. Grosvenor* the Decision was no more than that the Personal Property, to go as Heir-looms, was not part of the Property of Sir *Thomas Grosvenor*: the other was only an incidental point; it was argued that Sir *Thomas* was Heir Male of the Family. Lord *Hardwicke* only said, the Words taken together showed that some Person, not in case, was in view; he does not throw out that he should not

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(d) 1 Bro. C. C. 274.



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have thought them vested in a son of Sir *Thomas* or Sir *Richard*," which is the point in this Case. "I do not apprehend," his Lordship continues, "the Words, 'as far as the Law will allow,' extended the Power in *Trafford v. Trafford*; it was clear the Plaintiff should not take during the Infancy. The question was, whether *Sigismund* did not suit the description of the Person who was to take the Heir-looms as well as the Residue? Lord *Hardwicke* held the Claim to apply to different Persons; when it was found who was to take, it was agreed he was not to take till twenty-one; there was no question upon that part of the Case. These Cases, therefore, prove no more, than that the Will might be such that the first Taker should not take the whole. A Tenant in Tail having come into *esse*, the Personal Property vested in him, and through him in the Father." In *Bridgwater v. Egerton*, reported in Ves. sen. (e), but better reported in *Browne* (f), the Testator had given his eldest Son a power to take his Plate and Furniture, on allowing the Wife 400*l.* a-year, and the Books in question; and there the Will was, "I desire that my Books in Town and Country shall be deemed and taken as Heir-looms, and shall go to such Person as shall be entitled to the possession of my capital Mansion House at *Ashbridge*, by virtue of the Limitations in my Settlement. This falls very short of the Clause in this Case, and yet there the Court held the Infant Tenant in Tail was absolutely entitled. The next Case is *Foley v. Burnell* (g). In that Case Lord *Foley* devised his Estates to *Edward Foley*, his second Son, for Life, Remainder to Trustees to preserve, &c.; Remainder to Trustees for a Term, to raise a Jointure for the Wife of *Edward*—a Devise in strict Settlement; and he bequeathed all "the Standards, Fixtures, Household Goods, Implements of

(c) Page 122. (f) 1 Bro. C. C. 280. (g) Ibid. 274.

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Household, Furniture, and Pictures, Gold and Silver Plate, China, Porcelain, Glass, Statues, Busts, Library, and Books, which should be at either of his Houses, to be held and enjoyed by the several Persons who from time to time should respectively and successively be entitled to the use and possession of the same Houses respectively, as and in the nature of Heir-looms, to be annexed and go along with such Houses respectively for ever;" and then he directed one set of Plate for one House, and another set for the other; the Question there arose upon the second Tenant for Life, and his Son, coming into this Court to have the Plate secured; and Lord *Thurlow* adverted to the Point now in question, and held, that as the first Taker had a Son, Tenant in Tail, who died, the Chattels vested in him, and his Father took them as his Representative. The Parties were dissatisfied with that Opinion, and it was re-argued before the Lords Commissioners, and they agreed with Lord *Thurlow*. It went afterwards to the House of Lords, and they determined in the same way (*h*). The Question was afterwards raised in the Court of King's Bench, and they decided in the same way; we have, therefore, got a Case thus far, that if there be a direct Gift of personal Chattels, to be enjoyed as Heir-looms, with an Estate limited in strict Settlement, although there are the Words, that they shall be annexed and go along with the Estate for ever, yet the first Tenant in Tail of the Property, if he only lives a single moment, takes that Property, and all the other Limitations over are defeated by his Birth. Lord *Loughborough* put it strongly upon the absolute Right which he took upon his Birth, there being no Case which could authorize the Court to interpose a

(*h*) See 4 Bro. P. C. 319, 8vo. edit.

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Limitation adapted to hit exactly the Limitation which the Law allows, namely, giving it over in case the infant Tenant in Tail should die under twenty-one. Lord Commissioner *Ashurst* says, "The general Rule is, that where the Chattel Interest comes to one who would be Tenant in Tail of Land, the Limitations over are void. There is also another Rule, that the Interest may be so given as not to vest absolutely in the first Taker; where the Testator leaves it to the Court to make the Conveyance, the Court will protect the Property as far as may be; here, he has taken upon him to be his own Conveyancer." That observation was afterwards denied to be Law, because it was said the Courts would not do that; so that where the Testator has given them to be enjoyed for ever, the Court cannot interpose to tie up that beyond the ordinary Limitation, which vests it in the first Tenant in Tail. The next Case is *Vaughan v. Burslem* (i). In that Case, the Chattels and the Estate were in strict Settlement, and the Testator desired that his Son and his Daughter *Emma* should have the use of the Plate; and he directed further, "That all his Plate, Household Goods, Furniture, Glasses and China, which should be in his House at *Hanbury Hall*, should go as Heir-looms with his Real Estate, and be held and enjoyed by the Person or Persons that shall for the time being, by virtue of his Will, be entitled to his Real Estate, as far as the rules of Law and Equity will permit." So that this Case is distinguishable from *Foley v. Burnell*, in which the words were "that it should go for ever;" a limitation that could not, in any possible way, be effected. But in *Vaughan v. Burslem*, the direction was, that the Heir-loom should go with the Real Estate, and be enjoyed by the Person entitled to it; but still in that Case as in the others, there were no Trustees interposed;

(i) 3 Bro. Chan. Cas. 101.

that distinguishes the Cases. No Case could be more considered than *Vaughan v. Burslem* was, and it was held that the Words "as far as the rules of Law and Equity will permit," did not vary the rule of Law; that they did not authorize the Court to cut down the Limitation, but that the first Tenant in Tail took the whole Interest, and that the Court could not interpose such a Limitation, as that which will be in this Case contended for; and it is quite clear they have no claim whatever, unless they can demonstrate that this Court will interpose a Limitation over, in case the Tenant in Tail dies under twenty-one, to cut down the Estate in that event. The Court in that Case over-ruled the Opinion of Lord *Hardwicke*, that these Words, "as far as the rules of Law and Equity will permit," made the Case executory, and that they could carry them into effect. There Lord *Thurlow* says, "I am called upon to say, that the effect of the Will is to prevent the use from springing, where, if it springs, it would give an absolute Estate. To do this I must determine that the use shall not spring or vest till twenty-two years after the death of *Emma*, the first Taker for Life; how am I to gather this from the Words 'as far as the rules of Law and Equity will permit?' This cannot be; the Uses cannot go farther than the Law will permit, but these words have their sense, for he seems to have known that the personal Property could not go so far as the real. The case of *Gower v. Grosvenor* has the same Words; and it seems as if the Reporter took the Language of Lord *Hardwicke*, but there is a considerable chasm (*k*), and with what Modifications that was filled up can only be conjectured; but it is not necessary to follow all that is

(*k*) In another Case, by the same Reporter, in page 315, there is a similar chasm.

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there said, here the Estates are given to *Emma* for life, Remainder to the first and other Sons, with Remainder over; and the Furniture, &c. is to go to the Person entitled, as far as the Law will permit. The Person entitled seems an express description of the Child of *Cecil*; the other Cases have had different Words. In *Foley v. Burnell*, it was contended the word 'Possession' was in opposition to 'Reversion;' the Use there did not spring for want of the Contingency arising in which it was to spring; it would be pedantic to say, that *Gower v. Grosvenor* turns on the Words 'as far as the Law allows,' for they are explained by the different natures of Real and Personal Estates. To do what is called for in this Case, I must go much farther than ever has been done; I know of no instance where the Conveyance has been carried to the utmost extent of what the Law might do. I know Conveyancers have endeavoured to frame a Case to the utmost extent it can be carried; but here it might be suspended to twenty-two years after a life in being; he certainly meant the Son, if he was in possession, should have them. What then, shall they not be in possession in the mean time, nor vest in any body? Cases which say, you shall not do this for the Testator, by saying you shall do all that can be done, will not do. This would be fetching the intent of the Testator in a way many Cases have said it cannot be done; the Property cannot be rendered unalienable, but by preventing the Use from springing, which cannot be when a Person is born, who would take absolutely; it would be a direction to keep it unalienable as long as possibly could be. I am of opinion that the Words are not sufficient to give such a construction, and that consequently I must declare that this Property vested in the Son of *Emma*, and goes to the Father as his Represen-

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tative." This, therefore, is an Authority to show, in a Case precisely similar to *Gower v. Grosvenor*, that the Court, not forgetting what was said by Lord *Hardwicke* in that Case, decided upon the same Words, that they did not authorize the Court to do what Lord *Hardwicke* did seem to think they could do in delivering his Judgment in *Gower v. Grosvenor*. In *Carr v. Lord Erroll* (i), the direction was precisely the same as it was in *Vaughan v. Burslem*, but with this difference, that in *Foley v. Burnell*, and *Vaughan v. Burslem*, there were not any Trustees to whom the Heir-looms were given, but the Gift was to the objects at once; and in *Carr v. Lord Erroll*, it happened, as in the present Case, that there was a Gift to Trustees. The words there were the same in effect. It was "a devise to Trustees to permit the Heir-looms to go, together with the said Mansion House, to such Person or Persons as should, from time to time under his Will, become entitled to it, for so long a time as the rules of Law and Equity would permit." It was strongly relied upon, that the Gift to the Trustees entirely distinguished it from the preceding Cases, but the *Master of the Rolls* decided against the Claim; he said, "I am not able to discover any substantial distinction between this Case and *Vaughan v. Burslem*; there the intention was expressed in terms precisely the same as in this Will, the only difference is, that here the Chattels that are to remain at the Mansion House, as Heir-looms, are given to Trustees, who are to permit them to go, together with the Mansion House, to such Persons as shall from time to time, under this Will, become entitled to it, for so long time as the rules of Law and Equity will permit. In that Case the Testator, without interposing Trustees, directed that the Chattels

(i) 14 Ves. 478.

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should go as Heir-looms with his Real Estate, and be held and enjoyed by the Person or Persons that shall for the time being, by virtue of his Will, be entitled to his said Real Estate, as far as the rules of Law and Equity will permit. In the Trust interposed by this Will I do not see any thing executory, and therefore the question, whether there is any difference between an executory Trust by a Will, and a Covenant in Marriage Articles, does not arise, and consequently it is unnecessary to go into an examination of the point that was discussed in the case of the *Duke of Newcastle v. the Countess of Lincoln*; a Decree for this Plaintiff will not at all interfere with any thing that was discussed in that Case." As to what is said in the conclusion of the Judgment some further observations will be made, but that Case shows that the point never has been decided in the way the other side must contend for. *Gower v. Grosvenor* did not depend on the point in this Case, and Lord *Hardwicke's* Opinion in that Case has been overruled, not merely by the *dicta* of Judges, but by solemn decisions upon Cases where stronger words occurred than were used in *Gower v. Grosvenor*, and where Trustees were interposed. These are the only Cases that bear upon the case, and they are cases of Heir-looms. The case of the *Duke of Newcastle v. the Countess of Lincoln* (*k*), was first decided by the Lords Commissioners, and afterwards, on an Appeal, in the House of Lords (*l*). That was a Case in which there were Marriage Articles, and in which the Real Estate was agreed to be settled in strict Settlement, and a Suit was instituted that the Leasehold Estates should be assigned to Trustees, "to and for the benefit of such Person and Persons, and for such and the like Estate and Estates, and for such or the like ends, intents and purposes, as are therein

(*k*) 3 Ves. jun. 387.(*l*) 12 Ves. 218.

mentioned, of and concerning the said Castles, Honours, &c. as far as the Law would in that Case allow or permit." Upon that Case, it was insisted that the Court, acting upon those Articles, would interpose exactly such a Limitation as will be now contended for on the other side; and Lord *Loughborough* decided upon those words, that the Court would tie up the Property in the case of Articles, although not in a Will; nor does that Decision trench upon the Cases cited. In that Case the *Lord Chancellor* sets out with stating, "I perfectly agree with that reasoning in *Vaughan v. Burslem*, which, I think, cuts all the Cases upon Wills; for it is not true that you are to do for the Testator all that can be done by Law, you are to do for the Testator no more than he has intended to be done, and according to the common acceptation of the words. I lay no great stress upon those words, 'as far as the Law will admit.' I think there is no particular magic in them at all, but I wish to put it to you, whether, in the nature of things, there is not a radical and essential difference between Marriage Settlements and Wills;" and then he discusses the difference there is between them, putting the Case upon Articles and not upon a Will, and drawing the distinction already stated. He then says, "suppose the whole subject was Leasehold Estate, and stood upon an article that it should be conveyed according to the limitations of an Honour, and a Bill was brought to carry that Settlement into effect, after a Child had lived a day, should I permit the Father to say it was his Property? It is utterly impossible to make the identical settlement of the Leasehold Estate, as of the Freehold; but if I am to make it in analogy to the settlement of the Freehold, shall I not carry it on to all the near

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events, and shall they fail because I cannot embrace all the remote events?" And in delivering judgment, he decided accordingly, that it could not be tied up at far as the Law would carry the Real Estates. He says, the Court could not do it, and they certainly could not; but in the case of Articles, he was of opinion they might do that which in the case of Wills they could not, agreeing with the authority of all the Cases cited. This Case came on, upon Appeal, in the House of Lords, and was much debated, and Lord *Eldon*, who was not then Lord Chancellor, but in the House of Lords, as a Peer delivered a very long and elaborate judgment, and that judgment is so very full of matter, it is impossible to understand it without a thorough knowledge of all the preceding Cases. He takes for granted, that the Persons he was addressing knew of all the nice distinctions that had occurred. It is clear that Lord *Eldon* was of opinion, that the decision in the Court below went too far, and that it was impossible to reconcile it with *Vaughan v. Burslem*, even in the case of Articles, being of opinion that the Court ought not to go farther than the obvious meaning of the Instrument itself. He was also of opinion, that if the matter had been *res integra*, the opinion of Lord *Hardwicke* in *Gower* and *Grosvenor* was the better opinion, although it was clear that had been over-ruled by all the leading Cases; and he is reported to have held all this upon a distinction taken between an executory Trust in a Will, and in Marriage Articles. That distinction has been the subject of a great deal of discussion, and has been very much adverted to by different Judges, and it was very much discussed lately in *Jervis v. the Duke of Northumberland* (*m*), where Lord *Eldon*'s Opinion was relied upon; but he explained it in a way perfectly satisfactory, and

(*m*) 1 Jac. & Walk. 559.

stated that he was not of opinion there was no difference between an executory Trust in Marriage Articles and in Wills, but he said that Marriage Articles would necessarily be executory, and the Court would, upon the face of them, carry them into execution; and that if you can find, upon the face of a Will, that the Testator meant something beyond what he has expressed, then the Court will deal with it as an executory Trust, and it deals with it in precisely the same way. We argue here, from the Authorities, that there is no executory Trust in this Case, but that the Testator has been his own Conveyancer, and that the Court will have no power to limit the Property beyond the first Tenant in Tail. Upon the Appeal, before mentioned, Lord *Eldon* observes upon the case of *Trafford v. Trafford*; upon which he says, “ the first observation is, that I never found any Person, or any Book, that could inform me that a Court of Equity ever executed a Covenant of this sort, by postponing the vesting to the age of twenty-one, except the case of *Trafford v. Trafford*, in which the Testator himself had expressly said, the Property should not vest until that age. The words are not ‘ Issue Male,’ but ‘ such Male Person.’ First, that was clearly an executory Trust; next, the Limitation was expressly when the Party should be twenty-one, and not only that, but it was to a Person entitled to the Trust in possession.” His Lordship says also, in p. 232, “ The case of *Foley v. Burnell* is extremely important; the Court of Chancery at that time could not furnish a Case in which, under such a direction as occurred in *Gower v. Grosvenor*, and *Trafford v. Trafford*, the Limitation had been extended to the age of twenty-one, unless that period was pointed out to them by the Testator. In *Foley v. Burnell*, there was great discussion upon the words ‘ for ever,’ with reference to a Perpetuity, but

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upon the whole of the words taken together that objection did not prevail; and the Clause being directory, which a Court of equity would mould to the purposes of the Testator, upon its general principles there never was a Case in which Lord *Hardwicke's* reasoning might more properly apply. This was pressed by very anxious and able arguments upon Lord *Thurlow*, whose opinion was, that if the Testator did not give explicit directions as to his meaning, there was only the choice either to say the Leasehold Estates should vest *eo instanti* the Child was born, or to carry the Limitation to the utmost extent the Law would admit;" he then observes upon the distinction by the Lord Commissioner *Ashhurst*, saying, "my answer to that is, the Court may hereafter do that, but they never yet have done it. This Decree does not affect to do it, and there is no precedent that the Court ever did what Lord Commissioner *Ashhurst* supposes. That Testator did not take upon him to be his own Conveyancer. Upon the authority of Lord *Hardwicke* and of Lord *Loughborough*, in that Case, he did not; and if the Decree now before your Lordships is to stand upon those *dicta* of Lord Commissioner *Ashhurst*, it stops infinitely short of what those *dicta* require to be done; but that which Lord Commissioner *Ashhurst* has said, never was directed, except in *Trafford v. Trafford*, in which Case the age of twenty-one was expressly fixed by the Testator, which bound the Court." Therefore Lord *Eldon* has repeatedly stated, that that which will be contended for by the other side, never has been done, except in *Trafford v. Trafford*. In *Vaughan v. Burslem*, Lord *Thurlow* says distinctly, there was nothing in the circumstance that the words, "as far as the Law will admit," were not in Lord *Foley's* Will; "the words in *Vaughan v. Burslem*," says Lord *Eldon*, "were as strong as could be; but Lord

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*Thurlow* again held, considering himself fortified by the Judgment upon the Appeal in *Foley v. Burnell*, that he could never construe that Will as calling upon him so to modify the Personal Estate, as to tie it up for twenty-one years, which is as far as the Law will admit; and his Lordship marked all that reasoning upon the words ‘as far as the Law will admit,’ &c. by stating that it was mere pedantry to rely upon it; and held, a Son, upon coming into *esse*, absolutely entitled.” Upon the true result of the Authorities, the principle is not that the Property is to be tied up as long as the Law will admit. If it were *res integra*, the best principle, as it seems, would be, that the Testator ought to be considered as furnishing the Court with all the means of doing it, but the *Lord Chancellor* is clearly of opinion, upon Authority, that it could not be done, and that it is now too late. He says, “If it were *res integra*, the best principle according to my opinion would be, that the Testator ought to be considered as furnishing the Court with all the means of enabling the Party to tie up the Property, not as long as the rules of Law will admit, but to that convenient extent which will enable you to execute the general primary purpose of the Will or Settlement, to carry together the Real and Personal Estates, that principle clearly is not executed by this Decree.” A considerable difficulty was avoided in the *Duke of Newcastle v. Lincoln*, because, previous to the hearing of the Appeal, the Duke had attained twenty-one, and there was no necessity for deciding the principal point in question; and Lord *Eldon* has since said that the *Duke of Newcastle’s* Case decides nothing, and never could rule any other Case but one precisely similar in all its circumstances(<sup>n</sup>). The Rule, therefore, appears to be, that wherever the Testator expresses a

(<sup>n</sup>) See *Burrell v. Crutchley*, 15 Ves. 553.

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clear intention that his Chattels shall go to Persons for Life, and vest in a Tenant in Tail attaining twenty-one, the Court will execute his intention, but there is no case where it has done that, tying up the Property until the Tenant in Tail attains twenty-one, unless where he has so expressed it, but where the Chattels are directed to go with Real Property, as far as the Law allows, the Court has not gone farther than to give the first Tenant in Tail the absolute Interest. It is unnecessary to say much about the distinction between Marriage Articles and a Will. That has been very much discussed by the late *Master of the Rolls*, and by Lord *Manners* in *Ireland*; their opinion has been, that there was a distinction. There was a Case before the late *Master of the Rolls*(o), where he was of opinion that there was a very marked distinction between them. The Decree in that Case, as nearly as possible, agrees with what Lord *Eldon* laid down in the *Duke of Newcastle's* Case.

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The distinction is, you are guided to the meaning of Articles by the plain object of consideration in them, the Issue of the Marriage, but you know nothing of the motive and object of a Will but what you collect from the language of it.

*Counsel for Plaintiff.*—The Cases seem to come precisely to the point that will enable your *Honor* to decide in favour of our Client; the late Duke being unborn at the time of the Will, and being Tenant in Tail of the Barony of Lord *Vere*, he is the Person who must take, *quasi* Tenant in Tail, the Goods and Chattels. There is another difficulty in the way of the other side upon the words of these

(o) *Blackburn v. Stables*, 2 Ves. & Bea. 367.

Limitations; a difficulty it will be found not easily surmounted. It is this; the words of the Limitation are, "in trust for such Person as shall from time to time be Lord Vere, it being my will and intention and my sole motive for making this disposition, that the same Goods, Furniture, &c. shall, after the decease of my said Wife, from time to time go and be held and enjoyed with the Title of the Family, as far as the rules of Law and Equity will permit." These Words, "from time to time," would include Issue to the latest Generation. There is no objection to the Court giving effect to the Words in the way we contend, so as to carry it to the first Tenant in Tail, by which there would be no perpetuity; but this Clause extending, as it would, to the latest Generation, would come to this, that if there was a great Grandson, who died under twenty-one, the Court would not permit any one of these Classes to take; which would be clearly void. If the Testator had given it to one for Life, Remainder to the first and other Sons in Tail, there it might take effect. In *Ware v. Polhill*(p), there was a limitation of the Real Estate in strict Settlement, and a gift of the Leasehold Estates to be enjoyed with the Real Estates, and there was a Power to Trustees to sell those Leasehold Estates and invest the Purchase Money in the purchase of other Real Estates, and to settle them to the same Uses as were declared as to the Real Estates; therefore, if that Power was to be considered a valid one, it would have this effect, that after the Child had attained a vested Interest in the Leasehold Estates, the Trustees might divest him of that Estate and sell the Leasehold Estates. In that Case the Power in the Will was, that it should be lawful for his Trustees at any time hereafter, with the Consent and Approbation of the Person or Persons who shall, as

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aforesaid, for the time being be entitled to the Rents and Profits of his said Freehold and Copyhold Estates, signified by Writing under his or their hands, and attested by two or more credible Witnesses, or in case such Person or persons (not confining it within any limits which is the point now before your *Honor*) shall be a Minor or Minors, then at the discretion of the Trustees, to sell and dispose of all his said Leasehold Estates or any part thereof, and to lay out and invest the Money, arising by such Sale or Sales, in the purchase of Freehold or Copyhold Estates, and the same to be to the same Uses as the Freehold and Copyhold Estates. The point was raised by the *Lord Chancellor* himself, and having taken time to consider of it, he disposed of it in these words, " Upon further Consideration as to the Leasehold Estate, I think that power of Sale is void, for it may travel through Minorities for two Centuries; and if it is bad to the extent in which it is given, you cannot model it to make it good: I think the soundest ground is that the Power is bad." The other side will, perhaps, turn round upon us and say, this Trust then is void, but that is not so; it is not such a Trust; it does not break in upon a rule of Law, and there is no power in any body to defeat the Interest. It is only by adding a Clause, never inserted in such a Trust as this, that it would be made void; there is not the slightest foundation for the argument that it is void altogether; that could only be by interposing what the Court never has done; nor would such a Clause avoid the Interest of our Client: it would of itself be void, leaving the Gift to him to stand as a valid Gift. Upon these grounds, therefore, we conclude that, without affecting the rules of Law, it is quite impossible to say, that the Grandson already *in esse*, and so stated by the Testator, and made Tenant for Life, should be allowed to take this Pro-

perty, cutting out the whole Limitation, and substituting a Gift to him, his Executors, Administrators and Assigns ; but on the other hand, it is consistent with the Authorities, that the first Tenant in Tail should take the Property. That there is no pretence for the interposition of the Clause, that must be contended for by the other side ; confining the taking to a Tenant in Tail attaining twenty-one. The late Duke, therefore, having taking as *quasi* Tenant in Tail, although he died under twenty-one, became entitled to this Property.

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Mr. *Bell*, Mr. *Wetherell*, Mr. *Horne*, and Mr. *Shadwell*, for the Defendant, the present Duke of *St. Albans* :—

We appear on behalf of the present Duke of *St. Albans*, who is also Lord *Vere*. This case is novel. The exact case never occurred before. The first Question is, whether this is an executory Trust, and if so, the second Question is, how it is to be carried into execution ? If it be an executory Trust, the present Duke is entitled. What is or is not an executory Trust must depend upon all the circumstances of the case. The Property is given to Trustees ; the difficulty therefore in *Hyde v. Wellington* (q), for want of a Trustee, does not occur here. The Barony of *Vere* is limited in Tail Male. The Property is not to go with other settled Real Estate, but is given to the Wife for Life, then to the Son for Life, and then to the Lords *Vere* for the time being. If it be not an executory Trust, the Person first taking the Barony in Tail, after the death of the Wife and Son, would be entitled. It is, however, an executory Trust. There is Lord *Hardwicke's* Authority

(q) 1 P. Wms. 332. 2 Vern. 738. Gilb. Uses, 77.



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for that, who held in the case of *Gower v. Grosvenor* (r), that where Personal Property is directed to go with Real Estate, as far as the rules of Law and Equity will permit, such a direction makes it an executory Trust. Lord *Eldon* it is true has doubted that, but not in a case like this, where the Property is to go, not with Real Estate settled, but with a Title. Indeed it is difficult to say, abstractedly, that those Words do or do not create an executory Trust, because it must always depend on the language which accompanies them; you must look at the whole of the Gift. In *Stanley v. Leigh* (s), the usual mode of settling Personal Property, which is directed to go with Real Estate, is stated. The mode of Settlement, as there stated, is to limit the Personal Estate to Persons in *esse* for Life, with successive Remainders to the first and other Sons at twenty-one, but if they die under age with a Limitation over; that course prevents the Personal Estate being separated until the Son of the first Taker attains twenty-one.

In the present case the Testator says the Property “shall go and be held with the Title, as far as the rules of Law and Equity will permit;” in other words he says, “I do not know whether I have expressed myself in such a manner, as fully to accomplish my Intention, if the Words are to receive a legal Construction; but I have placed my property in the hands of Trustees upon Trust, which Trust is to continue as long as it can by Law. I will leave it to a Court of Equity to consider it as a Trust to be carried into effect under these directions.” It is thus an executory Trust;

(r) Barn. 54.

(s) 2 P. Wms. 686. I have a

MS. Note of this Case, which agrees with *Peere Williams*.

it was so considered by Lord *Hurdwicke*. Suppose an Estate Tail in *A.* granted by the Crown for Services, the Reversion in the Crown, and Personal Property is given to go with the Estate, as far as the rules of Law and Equity will permit, the Court would not say the Tenant in Tail was absolutely entitled, but would consider the Trust as binding, and limit the Personal Estate, so as to go with the Real Estate, as far as it could, according to the case of *Gower v. Grosvenor*. The present resembles the Case put. Certainly, in some of the latter Cases, in *Vaughan v. Burslem* and *Foley v. Burnell*, *Gower v. Grosvenor* is reported to have been doubted; but this Case is stronger than any of those Cases, the Property not being to go with an Estate, but with a Title. Those words, though not executory in some Cases, may be executory in a Case like the present. Indeed, when the *Duke of Newcastle v. Lord Lincoln* was before the House of Lords, Lord *Erskine* asked Lord *Thurlow* what his Opinion was, and he declared he did not mean to lay down such a nonsensical Rule as that the Words, “as far as the rules of Law and Equity shall permit,” did not import an executory Trust (*t*). The Testator could not mean the first Taker, the first Lord *Vere*, to have an absolute Interest, but the line must be drawn somewhere, and that line can only be found in the limitation to such extent as the Law has fixed as the boundary beyond which an Estate cannot be limited. In the *Duke of Newcastle v. Lincoln*, the distinction between Trusts executed and executory was much considered. It is said that in that Case the difficulty in this was avoided, as at the time of the Appeal the Duke of *Newcastle* had attained twenty-one, but the only difficulty avoided was that of nominating a

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(*t*) Mr. *Wetherell* stated this from private information.

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Person to take if the Duke had died under twenty-one; for in that case, although the Infant which had been born died, yet the Interest did not die, because it did not vest in him; and therefore the Decision was, that where there is a limitation of Real Estate, with a general Trust expressed of Chattels, and a Tenant in Tail who might take, is born, and dies, being an Infant, the Succession shall be continued for the sake of perpetuating the Chattel Interest, and go to other Tenants in Tail in Remainder; for the Duke of *Newcastle* was the second Tenant in Tail in Remainder, being the second Son of the first Tenant for Life. That Case is not in all points like this; but it is clear it has over-ruled those Cases from which it might be contended that the absolute Interest vested in the first Taker. In all the Cases there was a settled limitation of Real Estate to which to refer, and according to the Limitations of which, the Limitation of the Personalty was moulded; but here it is to accompany a Title. In *Foley v. Burnell*, *Vaughan v. Burslem*, and *Carr v. Lord Erroll*, the Personalty was annexed to Real Estate, and the first Tenant in Tail of the Real Estate took the absolute Interest in the Personalty; the Court was fettered in its Power of modelling the Limitations of the Personal Chattel, by the circumstance, that it was more or less directed to run parallel with the Limitations of the Real Estate; but here it is annexed to the Title, which constitutes the distinguishing peculiarity of this Case. Every Person taking the Title takes an Estate Tail in it; but because the first Taker takes an Estate Tail, it does not follow, in a Case like this, that he takes the Personalty absolutely, as where it is annexed to a Real Estate. When the Testator made his Will, *Aubrey*, and the two Grandsons were living, and if they had been intended to take an absolute Interest he would have so given it to them in terms.

The VICE-CHANCELLOR:—

It is plain why the Testator did not expressly give to those Grandsons, because they might not survive his Son, and therefore not be Lord Vere; his intention being, that the Persons who should be Lord Vere at his Son's Death should take.

*Counsel continued:—*In the *Duke of Newcastle v. Lord Lincoln*, Lord Loughborough, when the Case was before him, seems to have contemplated the present Case, for he says, if the Leasehold Property was to go along with the Honour in the manner as expressed here, he should consider it like Marriage Articles, in which he should be obliged to limit it in strict Settlement. His Decision in that Case was confirmed by the House of Lords. Upon the whole, as every one of the Persons in *esse* at the time of the Testator's death, were capable of taking the Title of Vere, and might have been made Tenants for Life, and as the present Duke of *St. Albans* was in *esse* and might have been made Tenant for Life in case the Sons of his Brother died under twenty-one, he is therefore entitled for Life. The Testator has settled the *Hornworth* in that manner.

The VICE-CHANCELLOR:—

I cannot look at that in the construction of this Clause.

Mr. Hart, Mr. Heald, Mr. Preston, and Mr. Pemberton, for Lady Louisa Manners:—

We are to contend against the Duke of *St. Albans*, and against his Uncle's Claim. If we exclude both, our Client is entitled to the whole of this Furniture, Plate, &c.; but if we are unsuccessful in that Claim, then our Client will be entitled to one Moiety, as one of the Representatives of the Mother of the late Duke. We must admit that if

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the Intention could prevail, it was the clear Intention of Lord *Vere*, though he has not expressed it in terms, to create successive life Estates; but that Intention we submit is by Law incapable of effect. The rule of Law is, that every claim to Personal Property must arise within a Life or Lives in being, and twenty-one Years afterwards, and allowing a reasonable period for Gestation. The only Question is, on the application of that Rule in this particular Case; that is the difficulty; and it depends upon whether this is to be considered as an executory Trust, and if so, whether that makes any difference. Suppose it be an executory Trust, what is the consequence? The Rule is, that in such cases a Person unborn may be made Tenant for Life, but you cannot ingraft the Succession on his Issue as Purchasers. And there is a difference whether you give to Individuals by Name, or whether you give to a class of Persons, and those Persons are not ascertainable till the period at which the Interest can vest, as in *Proctor v. Bishop of Bath and Wells*(u); *Gee v. Lord Audley*(x), and *Robinson v. Leake*(y). In the latter Case the Gift was to the Issue of a Person *in esse* on attaining twenty-four. The Objection was, that though there were Children *in esse* more than four years old, yet that it did not follow that any of them would be Legatees; they might die in the life-time of the Testator. The Gift was to those only who should attain twenty-four; and it did not follow of necessity that any one of those living at the date of the Testator's Will, would attain twenty-four.

With respect to Personalty, the doctrine of *Cy pres* has no application. *Humberstone v. Humberstone*(z) was a case of *Cy pres*. In this Case the Court must look at this

(u) H. Black. 358.

(x) 1 Cox's Rep. 324.

(y) 2 Meriv. 363.

(z) 1 P. Wms. 332.

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Will with reference to the period of its execution ; they must see the objects designated to take, and the order in which they were to take ; and must say in what mode the Court would have prepared a Settlement at the moment of the execution of the Will, if the Testator had then died. The first Person to take was the Widow, the next a Person *in esse*, the next Gift was to the Person who should succeed to the Peerage of *Vere* ; was he a Person *in esse* at the time of the Will ? It was uncertain whether any Person *in esse* would become Lord *Vere*. The Grandson became Lord *Vere*, but that was by accident, not merely because he was *in esse* at the Will, but because he fell within the character and description of being the first next successor to the Peerage. If the Will had been that he should take at twenty-four, then, according to *Robinson v. Leake*, the Gift would have been void, because it could not be predicated of him that he would be able to take at twenty-one, and it was not in this case certain that he would be the Person to take : he might have died, and left a Son, or some other Person, who would succeed to the Peerage. Neither of these Persons, therefore, who claim under the Grandson, or the present Duke, can say, “ I am the Person designated by this Will ; ” there is not any Gift to him personally. The Gift is to a class, and by a description which they may or may not answer ; and the Court, in directing a Settlement, would have limited the Property to Baroness *Vere* for Life, with Remainder to the eldest Son for Life, with Remainder to such Person as should be the next Lord *Vere*, after his death ; and such Person must have taken the absolute Interest. You may give to a Person unborn an Estate for Life, but you cannot engraft a Succession on that Life Estate ; nor give to two Generations of unborn Persons in Succession : such

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ulterior Gift would be void, as being too remote. In *Barlow v. Salter* (z) it was held, that if a Life Estate be part of a series of more remote Limitations, it is void, as being the first part of a series of Perpetuities. Suppose then, that this had been a Leasehold Estate limited to the Wife for Life, with Remainder to *B.* his unborn Son for Life, Remainder to the first and other Sons of that unborn Son, the Gift is too remote, as being to the Children of a Person not *in esse*; and supposing the next Limitation was to *C.* for Life, that would *per se* be good, because it could have no tendency to a Perpetuity, he being *in esse*. A Gift for Life, standing *per se*, can never be too remote, as was held in *Cotton v. King* (a), and other Cases; but the Gift to *B.* as well as his Sons would, in the Case put, be altogether void, the Life Estate being part of a series of Perpetuities, as was held in the case of *Barlow v. Salter*, before alluded to. *Audrey Lord Vere*, if he had been designated, might have had a Life Estate; but he is not designated, nor did it necessarily follow that he was to take, or that his Son or Grandson would take. In order to bring the Grandson within the scope of the Gift, it must be contended, that in directing a Settlement, the Court would limit the Property to the Baroness *Vere* for Life, then to the Son *in esse* for Life, then to such of his Sons as should become Lord *Vere*, and attain the age of twenty-one years; but this Case, from the nature of the Gift, will not admit of any such qualification as to Sons attaining twenty-one. Events occurring since the death of the Testator, can have no effect in the framing of the Settlement.

Hitherto the Argument proceeds on the supposition that this is an executory Trust, but it is very question-

(z) 17 Ves. 482.

(a) 2 P. W. 108.

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able whether this is not a Trust executed. The distinction between those two sorts of Trusts is well known. In this Will nothing is left to the Court or Trustees to do to carry the intent into execution; it is a Gift of "all his Household Goods, Furniture, &c." not upon Trust to convey, which alone are executory words; but upon trust to permit his Wife and Son to have the Use and Enjoyment for their Lives, and then upon trust, not to settle or convey or assign, nor to do any act whatever, but to stand and be possessed of the same Goods, Furniture, &c. for such Person as shall from time to time be Lord Vere. That surely is a Trust executed. It is a complete gift of the complete Ownership. The Trustees are not to be actively employed in any thing, they are merely passive, they have no discretion; and being a Trust executed, it follows that the Court has not any Authority, as in the case of Trusts executory, to mould the Limitations according to the supposed intention of the Testator, but must take the words and act upon them, as they are in legal construction, and as if no Trustees were interposed, as in the cases of *Foley v. Burnell*(b), *Vaughan v. Burslem*(c), and other Cases. The Case of the *Duke of Newcastle v. The Countess of Lincoln*(d), can only be reconciled upon the ground that the Trusts were considered as executory; besides, in that Case, the intent was more explicit than in this Case, the Chattels being to be tied up in the same way as the Real Estate, as far as the rules of Law would permit.

The VICE-CHANCELLOR:—

I think no Person can take under a description by Class, if prior to him in that Class there might have been Persons with respect to whom that Limitation would have been too remote; he may take by Class, if

(b) 1 Bro. C. C. 274. (c) 3 Bro. C. C. 101. (d) 12 Ves. 218.



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prior to him there could not, by any possibility, have been any Person with respect to whom the Limitations would have been too remote. This distinguishes the present Case from the Authority cited.

*Argument continued*:—A Gift to a Class may be good, but successive Life Estates to Persons unborn would not. Upon the whole we contend, that as the first Taker of a Class, the absolute Interest vested in *Aubrey Lord Vere, Duke of St. Albans*, who died in 1815, and that it belongs to his Wife and Executrix.

In the course of the Argument, *Sommerville v. Lethbridge* (a), *Seaward v. Willock* (b), and *Beard v. Westcote* (c), as to successive Life Estates, were referred to.

The VICE-CHANCELLOR desired Mr. *Sugden* to confine his Reply to *Gee v. Lord Audley*, and the class of cases on Perpetuities.

Mr. *Sugden*, in Reply :—

Some of the Cases cited do not appear to apply to the present Case. In *Gee v. Lord Audley*, it was clear upon the Gift, that it might not take place until twenty-seven years after the death of the Testator; on the face of it it was bad; and Lord *Kenyon* held, that being void as to some in the Class, it was void as to all. In *Procter v. the Bishop of Bath and Wells*, the Limitation was to the first or other Son of a Person named, who should be bred a Clergyman, and be in Holy Orders; and as by the regulations of the Church, no Person could answer that description until he attained twenty-four, the Limitation was void on the face of it. *Sommerville v. Lethbridge*, and Cases of that class, do not apply in a Case like the present. In that Case there was a general Limitation for twenty-one years, extending to.

(a) 6 Term Rep. 213.

(c) 5 Taunt. 393.

(b) 5 East, 198.

the Issue of those Persons, and in default of those Persons only, the Estate was given over in Remainder. In such a case the first unborn Son takes for Life; but you necessarily cut off all the subsequent Limitations as too remote, in which respect the Law is different from every other species of Limitation. For if the question of remoteness be not applicable to the Limitation, the general Rule is, that the Remainder over is accelerated and takes effect, and it is only in this case that the Law makes them all void together. The next Case cited is *Humberstone v. Humberstone*; that Case shows how far the Court will struggle, in cases of executory Trusts, to effectuate, to the extent which the Law allows, an intention which is illegal. In that Case the intention was void, so far as it went to create Estates for Life to Persons unborn, with Remainder to their Issues as Purchasers, but the Court gave the best effect it could to the intention, by giving Estates Tail to Persons not born at the time of the Will, and this Case shows how far the Court will go to effectuate the intention in cases of executory Trusts. Even in Trusts executed, as where there was a legal Devise to one unborn, for Life, Remainder to the first and other Sons of such unborn Person as Purchasers in Tail, the Court, the Remainder in Tail being void, will, upon the doctrine of *Cy pres*, give the first Taker an Estate Tail, under which the Issue may take, thereby giving effect, as far as by Law it can, to the intention of the Testator. It was so held in *Chapman v. Browne* (e), and afterwards on appeal to the House of Lords. In *Pitt v. Jackson* (f) the doctrine of *Cy pres* was applied to a Power. It must, however, be admitted, that the doctrine of *Cy pres* does not apply to Personal Estate, but if as to that the Court can, as in the present Case, see an

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(e) 3 Burr. 1626.

(f) 2 Bro. C. C. 51.

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intention which can only be effected by giving an Estate Tail to an unborn Grandson, it will, I apprehend, so mould the Limitation in that way, giving to such Grandson the absolute Interest. Supposing this not to be an executory Trust, yet upon the doctrine in *Chapman v. Browne*(a), the Court is at liberty in this Case, by construction, and to effectuate as far as it can the Testator's intention, to give to the Grandson, who is incapable of taking for Life, the whole Interest, rather than to deprive him of all Interest whatever. *Beard v. Westcott*(b), mentioned on the other side, was a Case in which there was a valid Limitation, with Remainders over that were admitted to be void; then there was a contingent Limitation, that if a particular event should happen, the Property should go in another direction. The Court thought themselves at liberty to hold, that if the particular event happened, they would give effect to it; but that has no application in this Case; and if the Case did apply, it cannot be relied upon, for the *Lord Chancellor* has directed a new Case, which stands for argument in the Court of King's Bench. *Crompe v. Barrow*(c) has no analogy to the present Case; there were alternate Dispositions to Strangers in one event, and to the object of the Gift in another event; the Contingency happened under which the object of the Gift was to take, and Lord *Alvanley* determined it was a valid Limitation. That Case admits of no doubt. *Barlow v. Salter* decided none of the points in the present Case; it was held there that a Gift over, after a Gift which would be an Estate Tail, or an executory Devise, shall be cut down to the failure of Issue at the death of the Party, by reason of the Gift over being confined merely to a Life Estate, the Court thinking that was a circumstance to confine it to the Death. So much for the Authorities

(a) Sug. Gilb. Uses,  
(b) 5 Taunt. 392.

(c) 4 Ves. 681.

cited on the other side. It is said there is great difficulty in giving effect to the intention; it does not appear to us so difficult. This is a Trust, which being general in its terms, requires a construction to be put upon it so as to give effect to the intention, as far as possible, without intrenching on the line drawn to prevent Perpetuities. The Testator himself has told the Court, in construing his Will, that it is to be guided by the rules of Law and Equity. The Testator has plainly intimated, that the Trust is to be so construed as not to admit any Person into this Estate but a Lord Vere. The first Son, Aubrey Lord Vere, the Son of the Testator, is made Tenant for Life, he is named as Lord Vere, because in the subsequent Clause, where he has given him an Estate for Life, he speaks of the way in which it is to go after the death of the Widow; and so far from giving the Grandson an absolute Interest, the Testator points out a Person whom he has before expressly restricted to an Estate for Life, thereby showing he is dealing with them as Persons *in esse*. By the Will you find the Grandson is *in esse*, and that he is made Tenant for Life of the Estate, why then is he not to take as Tenant for Life, under the Gift which is to go to him, Lord Vere for the time being, as far as the rules of Law and Equity will permit? Supposing this to be an executory Trust, the Court will not execute it in the very words of the Trust; it does so in Marriage Articles, which import a consideration, but in the case of a Will, the Court considers what are the words, and executes the Trust accordingly, unless an intention appears that the words were not meant in their technical sense. *Blackburne v. Stables*(f) is an Authority for that proposition. I do not admit that every Person was intended to take for Life, because the Lords Vere were to take only for Life as long as that was per-

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(f) 2 Ves. & Bea. 367.

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mitted by the rules of Law and Equity; those Rules allow Estates for Life to be given to Persons *in esse*, but do not permit Persons not *in esse* to take for Life.

Though the devise of a Term to one for Life, with a Contingent Remainder over, will in general only entitle the first Taker to a Life Estate, if the Remainder over do not take effect, and the residue of the Term would go to the Personal Representative of the Testator, yet if the Testator's intent appears to be to dispose of the whole Term from his Executors, it has been held that the Devisees for life are entitled to it (g).

Upon the whole, the Case stands upon the broad ground that this is a Trust to be construed by the Court, not to be executed; not a Trust to be modified by the Court; and therefore it is a Trust executed in that view of it; and it enables the Court, by construction, to give to every Person that could take Estates for Life; it enables the Court to carry it on as far as the Law will allow. It is clear that such a Limitation could have been made without difficulty, so as to vest the Property in my Client absolutely.

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The questions as to Dower were compromised, it being agreed on the one hand, that the claim to Dower out of the office of Keeper of the Hawks, and the Profits and Emoluments, should be given up; and on the other hand, that a right of Dower as to *Bestwood Park* should be allowed.

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The VICE-CHANCELLOR:—

In this Case the Testator having given certain Furniture, Plate, and other Articles to Trustees, upon trust that his Wife should have the use of them for her Life, and then for the use of his Son for his Life, proceeds

(g) *Doc v. Cooke*, 7 East, 269.

to declare, that after the death of the Survivor of his Wife and Son, they are to be held upon trust for such Person as should from time to time be Lord *Vere*, it being his will and intention, and his sole motive for making that Disposition, that the said Furniture, &c. should, after the death of his Wife, be held and enjoyed with the Title of the Family, as far as the rules of Law and Equity would permit. The question first made, is, whether after the death of the Survivor of the Wife and Son, there is a direct Gift, or only an executory Trust to be modified by this Court? the expression “upon trust for such Person as shall from time to time be Lord *Vere*,” has, plainly, words of direct Gift. Then follows, not further words of Gift, but a declaration of his intention and motive in making that Disposition. He gives to such Person as shall from time to time be Lord *Vere*, because his purpose is, that the Enjoyment shall be continued with the Title of the Family, as far as the rules of Law and Equity will permit; in other words, he gives to such Person as shall from time to time be Lord *Vere*, with a declaration that each Lord *Vere*, in succession, shall take the use and enjoyment until there be a Lord *Vere*, who cannot by the rules of Law and Equity be confined to the Use and Enjoyment only. This declaration, therefore, is nothing more than a legal qualification of the prior general description of his Legatees, and the effect is the same as if the Will had been in the following form, “upon trust for such Person as shall from time to time be Lord *Vere*, it being my intention that the absolute Interest shall not vest in any Lord *Vere*, who may by the rules of Law and Equity be limited to the Use and Enjoyment only.” In this view of the case, there is a direct Gift, and nothing executory. By the rules of Law and Equity, every Person living at the death of the Testator, who should become Lord *Vere*, might be limited to the Use and Enjoyment only.

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The Son and the Grandson of the Testator were living at his Death, and were both therefore limited to the Use and Enjoyment only ; but the Child who succeeded the Grandson as Lord *Vere*, and Duke of *St. Albans*, was not living at the death of the Testator, and could not therefore by the rules of Law and Equity be limited to the Use and Enjoyment only. He took therefore an absolute Interest, which is now vested in his personal Representative.

The Decree was, “ This Court doth declare, that Plaintiff, Lady *Mary Deerhurst*, as Administratrix to the late Infant Duke of *St. Albans*, is absolutely entitled to the Goods, Furniture, Pictures, Books, Linen, China, Glasses and Plate directed by the Will of *Vere*, Lord *Vere*, the Testator in the Pleadings named, to go and be held and enjoyed with the Title of the Family : And declare that the office of Keeper of the Hawks, or the Profits and Emoluments thereof, are not subject to the right of Dower of *Louisa Grace Manners*, late Duchess of *St. Albans* ; but doth declare, that *Bestwood Park* and Premises, in the Pleadings mentioned, are subject to the said right of Dower : And this Court doth order and decree, that it be referred to Mr. ———, one, &c. to take an Account of such part of the Rents and Profits of *Bestwood Park*, and the Premises thereunto belonging, and of the Salaries, Fees, Profits and Emoluments of the said office of Keeper of the Hawks, and of the Interest, Dividends and Profits of the Personal Estate of the said Testator, Lord *Vere*, directed to be laid out in Land, as have accrued and become due between the death of *Aubrey* Duke of *St. Albans*, the Father of the said late infant Duke of *St. Albans*, and the said late infant Duke’s Death, and take an Account of the sums of Money which have been applied for the Maintenance and Education of the said late infant Duke of *St. Albans*,

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and take an Account of the arrears of Dower due to the late Duchess of *St. Albans*, out of *Bestwood Park*: And it is ordered, that the said *Master* do also take an Account of what Goods, Furniture, Pictures, Books, Linen, China, Glasses and Plate, were given by the said Testator Lord *Vere's* Will, and in whose Possession or Power the same have been and now severally are, and whether any and what part of them have been sold and converted into Money by any and what Persons, at any and what Times respectively, and how the Money produced by such Sale or Conversion has been applied, and whether any and what part thereof was invested in any and what government or other Securities, and in whose Names or Name, and how the same has from time to time been changed or varied, and what Sum is now invested, and in what government or other Securities or Security, and in whose Names or Name, and how the Dividends, Profits or Interest of the said Proceeds, or produce of the said Sale or Conversion, have from time to time been applied:- And it is ordered, that the said *Master* do inquire whether any and what part of the said Goods, Furniture, Pictures Books, Linen, China, Glasses and Plate, have or has been destroyed, and by whom, or by what means, and at what time or times in particular; and the said *Master* is to be at liberty to state special circumstances, and make separate reports of any of the Matters aforesaid, if he shall think proper: And it appearing by the Answers of the Defendants, *Andrew Berkeley Drummond*, *Charles Drummond*, and *John Drummond*, that there are standing in their Names 928*l.* 6*s.* 5*d.* Bank 4 per-cent. Annuities, which were purchased with Money arisen by sale of the Household Goods, Furniture, Linen, China and Glass, and some of the Pictures bequeathed by the Will of *Vere* Lord *Vere*, in the Pleadings named; it is ordered, that the said *Andrew Berkeley Drummond*, *Charles Drummond*,



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and *John Drummond*, do transfer the said 928*l.* 6*s.* 5*d.* Bank 4 per-cent. Annuities, into the name and with the privity of the Accountant General of this Court, in trust, in this Cause; and the said Accountant General is to declare the Trusts thereof accordingly, subject to the further Order of this Court: And for the better taking the Accounts and discovery of the Matters aforesaid, the Parties are to produce before the *Master*, upon Oath, all Books, Papers and Writings in their Custody or Power, relating thereto; and are to be examined upon Interrogatories as the *Master* shall direct; who in taking the said Accounts, is to make unto the Parties all just Allowances, and reserve the consideration of all further Directions, and of the Costs of this Suit, until after the *Master* shall have made his Report, and any of the Parties are to be at liberty to apply to this Court as there shall be occasion.

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ATTORNEY GENERAL v. Duke of MARLBOROUGH.

23d Dec.

*An Injunction had been granted to prevent the cutting of Timber or other Trees standing or growing for the shelter or ornament of*

*Blenheim House, but on Petition a reference was made to inquire and state whether any of such Timber and other Trees might be cut with advantage to the present ornamental character of the Gardens, &c. or because they were too thickly planted to admit the most ornamental growth, or for any other reason.*

THIS was a Petition by the Duke of *Marlborough*, stating the Acts of Parliament of the 3 & 4 *Anne*, the 5 *Anne* and the 1 *Geo.* 1, the Injunction against the Defendant, and the Demurrer by him, which was overruled by the *Vice-Chancellor* (a), and the Appeal from such Decision; and further stating, that among the Plantations included in the literal terms of the Injunction, there are large quantities of Timber and other Trees,

(a). See *ante*, 3d Vol. p. 498.

which, in the course of good Husbandry, ought immediately to be cut down as to some parts thereof, by reason that the same are going to decay; and as to other parts thereof by reason that such Timber and other Trees are so closely and thickly growing together, that they injure and destroy each other; and as to others of them, that they destroy the Herbage and ornamental Surface and Underwood of the said Ground and Plantations. The Petition Prayed, that the Injunction might be dissolved, or that such Order might be made as might be consistent with the Petitioner's Right and Interest in the Timber and other Trees; and that it might be referred to a *Master* to appoint a proper Person or Persons, with all fit and necessary directions, to make a full and complete survey and valuation of all Timber and other Trees standing, growing or being in or upon the said Park or Parks, Plantations and Premises, and which are included in the terms of the aforesaid Injunction; and to mark or select such and so many of the said Timber and other Trees as shall be fit, or in proper course or otherwise advantageous and proper to be cut down, regard being had to the nature and extent of the Petitioner's Estate and Interest in such Timber and other Trees, and in the said Park or Parks, Grounds and Plantations; and that so much or so many of the said Timber and other Trees as should be selected and marked for cutting, by the Person or Persons making such Survey and Valuation, might be forthwith cut down and felled, and sold and disposed of with all convenient speed, for such Sum or Sums as should appear to be the best Price or Prices that could reasonably be had or attained for the same; and that the Monies to arise from such Sale or Sales might be paid to or according to the direction of the Petitioner; and that the Petition, and the Order therein, might be declared to be without prejudice to the said Appeal, or any question in this Cause.

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Upon this Petition the following Order was made:—

“Declare, that the Defendant the Duke of *Marlborough*, by the true construction of the several Statutes which are in *pari materia* upon this subject, is not entitled to cut Timber or other Trees which are standing or growing for the shelter or ornament of *Blenheim House*, except in the execution of a purpose of improvement in the ornamental character of the Gardens, Pleasure Grounds, Park and Plantations; and it not being alleged, that the Defendant the Duke of *Marlborough* has in contemplation any general purpose of improvement in the ornamental character of the said Gardens, Pleasure Grounds, Park and Plantations, refer it to the *Master* to inquire and state whether any and what Timber or other Trees which are standing or growing for the shelter or ornament of *Blenheim House*, may now be cut with advantage to the present ornamental character of the said Gardens, Pleasure Grounds, Park and Plantations, either because they are prejudicial to more ornamental Trees, or because they are too thickly planted to admit of the most ornamental growth, or for any other reason; and let the Injunction granted by the Lord *Chancellor's* Order of the ——— day of ——— be continued until the further Order of the Court.”

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7th &amp; 21st Feb.

*Mortgage of  
a Copyhold.*

*The Mortgagor  
became a Bank-  
rupt, but no  
Bargain and Sale*

LLOYD and others v. LANDER and others.

IN August 1814, *Thomas Lowe* applied to the Plaintiff *Fisher*, an Attorney, (but who had never acted as Attorney for *Thomas Lowe*,) and requested him to obtain for him a Loan of 1,500*l.* or 2,000*l.* on a mortgage of certain Copyhold Premises situate in the County of *Stafford*, was made to his Assignee. The Mortgagee files a Bill against the Bankrupt, and his Assignee to redeem. The Bankrupt demurs, and Demurred allowed, he not being a necessary Party to the Bill.

which Premises he had recently agreed to purchase, and the Plaintiffs agreed to lend him 1,300*l.* Five per- Cent. Navy Annuities, (which Sum they held as Trustees under a Settlement upon *Fisher's* Wife and Children,) upon an Agreement that he would within a twelve-month replace the same, and in the mean time pay the Plaintiffs such Sums by way of Interest thereon, as they would have been entitled to receive in Dividends if the Stock had remained standing in their Names.

*William Crees* acted as the Solicitor of *Thomas Lowe*, and he was also Steward of the Manor in which the Copyhold Premises were situated, and he represented that by the custom of the Manor no conditional Surrender could be made redeemable within any less period than three years, and that he knew no instance upon the Court Roll Books of the Manor of any conditional Surrender being made for any Loan of Stock, but only in respect of Money advanced. It was therefore agreed, that the 1,300*l.* Stock should be sold, and the produce advanced to *Thomas Lowe* on a mortgage of the Copyhold Premises, and as the Consideration for such Mortgage; but to effectuate the real intention, a Covenant was to be entered into for replacing the Stock, and paying the Dividends as before agreed upon, and for making the Mortgage absolute in default of the Stock being replaced, or the Dividends paid at the time agreed upon, and also that a Bond for the performance of the Covenants should be executed. The Stock was sold, and 1,132*l.* 12*s.* 6*d.* was produced by the Sale, which was paid to *Thomas Lowe*, and on the 10th April 1815, he surrendered the Copyhold Lands to the use of the Plaintiffs, their Heirs and Assigns, subject to a proviso, that if *Thomas Lowe* should pay the 1,132*l.* 12*s.* 6*d.* to the Plaintiffs, on or before the 10th April 1818, with

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Interest, the Surrender should be void. The Plaintiffs were admitted. By Indenture, dated on the same 10 April 1818, after reciting the foregoing particulars, it was declared and agreed between the Parties as to the said Surrender before mentioned, and notwithstanding the proviso for redemption therein contained, that it was the true intention of the Parties, that if *Thomas Lowe*, his Heirs, &c, should on or before the 25th March next ensuing, transfer 1,300*l.* Five per-Cents. into the names of the Plaintiffs, their Executors, &c. and in the mean time pay the amount of the Dividends, the Estate and Interest of the Plaintiffs in the Copyhold should cease, and *Thomas Lowe* covenanted to make such Transfer and Payment accordingly, and in case of default that the Plaintiff should hold the Copyhold Premises absolutely discharged from all right of redemption. *Lowe* also on the same day executed a Bond for the performance of the Covenants contained in the said Indenture.

On the 23d November 1816, a Commission of Bankruptcy issued against *Thomas Lowe*, and he was declared a Bankrupt, and the Defendant *Lander* was chosen sole Assignee, but no Bargain and Sale or Conveyance of the Real Estate of the Bankrupt was executed by the Commissioners to *Lander*. The Stock was not repurchased, and only three years and a half of the amount of the Dividends were paid. The *Prayer* of the Bill was, for an account of the Sums which the Plaintiffs would have been entitled to receive for the Dividends and Interest in respect of the said 1,300*l.* Five per-Cents. since the time of the sale, if the same had not been sold, and of the Monies received by the Plaintiff on account of such Dividends and Interest; and that the Defendants, some or one of them, do upon

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a day to be fixed, re-transfer the 1,300 *l.* Stock, and pay the Dividends and Interest due, or that they might be foreclosed, and surrender the Premises to the Plaintiffs, their Heirs, &c. and deliver up all Title Deeds, &c. to this Bill the Defendant *Thomas Lowe*, the Bankrupt, put in a General Demurrer, for want of Equity.

Mr. *Rose*, in support of the Demurrer :—

The Demurrer admits the conditional Surrender, and that no Bargain and Sale has been made to the Assignee ; but the Bill does not state, and of consequence the Demurrer does not admit, that there is a Surplus to which the Bankrupt is entitled, or that there is any collusion ; and the simple question is, whether, on a Bill to foreclose a Mortgage of a Copyhold Estate, made by a Person who afterwards becomes a Bankrupt, and whose Estates have not been assigned to his Assignee, the Bankrupt is a necessary Party ? On the part of the Defendant it is contended he is not ; and that where a Mortgage of Freehold or Copyhold Property is made, and the Mortgagor becomes a Bankrupt, the Bankrupt, on a Bill to redeem, or foreclose, is not a necessary or proper Party, but only his Assignees. All his Interest is divested by the Bankruptcy. The Equity of Redemption is an Interest in the Bankrupt, of which the Bankrupt Laws divest him. The 13 *Eliz. c. 7. s. 3*, makes the first mention of Copyholds, and they are held to be within the intent and purview of all the Bankrupt Statutes(*a*). By the 21 *Jac. 1. c. 19, s. 13*, it is provided, that Estates mortgaged by the Bankrupt may be redeemed by any Person appointed by the Commissioners. At that time General Assignees were not chosen as now. They were introduced by the Statute of *Anne*. Afterwards the

(*a*) See *Cooke's Bankrupt Law*, 282, edit. 5th.

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Statute was held to apply to an Equity of Redemption in the Bankrupt, and that the Assignees might redeem (b). And that case was followed by *Pope v. Onslow* (c), and recently in *Bainbridge v. Pentian* (d), and properly; for if the Estate were Freehold, though no Bargain and Sale had been made, yet all the equitable Interest in the Bankrupt was out of him, and of course the Equity of Redemption. The Bankrupt could not redeem. There is no case directly in point. In *Spriggs v. Banks* (e), it is said, the Bankrupt cannot redeem, but only the Assignees; and in *Benfield v. Solomons* (f), it is stated as a principle, that whatever the Bankrupt might depart with, in some way or other the Creditors shall have under the Bankruptcy. That Case, in principle, comes near the present. It was a Bill by a Bankrupt against a Mortgagee of Estates in *England* and *Berbice*, for an account and payment of the Balance to the Assignees, who were also Defendants, charging collusion, but not averring there would be any Surplus; and a Demurrer was allowed. If any doubt could be entertained as to Freehold Property, there can be none as to Copyhold. The first Estate is in the Lord; the Copyholder is a mere Tenant at Will. Your Honor, following *Drury* and *Mann* (g), has determined (h) that a purchaser of a Copyhold in Bankruptcy may take a Conveyance in the first instance from the Commissioners, and that an intermediate Bargain and Sale to the Assignees is not necessary. The Bankrupt has nothing in him, and is not a necessary Party to the Conveyance. In this Case he has no Interest in him, and he is not a necessary Party to the Suit, and ought not to be put to the expense

(b) *Hitchcock v. Ledgwick*,  
2 Vern. 155.

(c) 2 Vern.

(d) 1 Buck, 135.

(e) 5 Ves. 590.

(f) 9 Ves. 83.

(g) 1 Atk. 95.

(h) *Ex parte Holland*, ante,  
4 Vol. 483.

of being a Party, he being divested of all property. The Demurrer is therefore sustainable.

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Mr. Sugden, in support of the Bill:—

The Freehold and Copyhold Estate of a Bankrupt remains in him until a Bargain and Sale is made by the Commissioners to the Assignees. The Assignee in this Case has not had any Bargain and Sale executed to him. The Bankrupt therefore is a necessary Party. I admit the Cases cited to show that a Bankrupt cannot file a Bill to redeem, but that his Assignees must file the Bill; but in order to do so they must first have an Assignment to them from the Commissioners of the Bankrupt's Interest. In the Case of *Doe v. Mitchell* (i), the Court held, that until a Bargain and Sale the Estate remained in the Bankrupt; therefore, that a demise laid after the Bankruptcy, but before the Bargain and Sale, was bad. It was necessary to bring before the Court all Parties interested. Suppose the Assignees had disclaimed, not choosing to take a Bargain and Sale, the Bankrupt would be the only Person who could convey; the Court would not direct the Assignee to take a Bargain and Sale, and then convey to the Plaintiff. In the case of a Lease to the Bankrupt, which the Assignees do not choose to adopt, it remains with the Bankrupt, and he is liable for the Rent (k). The Bankrupt instead of demurring might have disclaimed, and the Court could have acted upon the Disclaimer.

The VICE-CHANCELLOR:—

Suppose the Assignees chose to redeem this Mortgage, from whom would they take a Conveyance?

(i) 2 Maul. & Selw. 446. may be compelled either to

(k) Under the 49 Geo. 3. accept, or give up, the Lease.

c. 121; s. 19, the assignees.



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Mr. Sugden:—

Difficulties have arisen in those Cases. I should not think a good Title could be made by the Assignees unless they had a Bargain and Sale; but supposing a Bargain and Sale not necessary in that case, it does not decide the present. In a Case of this kind, recently in the *Exchequer*, the *Lord Chief Baron* thought the Bankrupt was a necessary Party. Besides, in this Case there was a fraud, and the Bill states the Bankrupt was an agent in the fraud; and also, that he has Deeds in his possession which the Bill seeks to have delivered up.

The VICE-CHANCELLOR:—

My impression is, that after the Bankruptcy the Equity of the Bankrupt no longer remains in him, but that it is actually or potentially in his Assignees, and therefore that this Demurrer cannot be sustained. There would be great inconvenience in holding the Bankrupt to be a necessary Party; but I will look into the Cases.

The VICE-CHANCELLOR:—

21st Feb.

This is a Bill of Foreclosure, filed by a Mortgagee against the Assignee of a Bankrupt Mortgagor, and the Bankrupt is also made a Party, it being alleged that a Bargain and Sale of the Equity of Redemption has not been made to the Assignee. To this Bill the Bankrupt has demurred, insisting, in effect, that he ought not to be made a Party to this Suit. It lies upon the Plaintiff to show, that in some way in which this Suit may terminate it is necessary for his protection that the Bankrupt should be a Party; the Suit must terminate either in Redemption or Foreclosure. If the Assignee, being the sole Defendant, redeem the Plaintiff, and he re-conveys the Estate to him, it is not alleged that the absence of the Bankrupt from the Suit

can be a prejudice to the Plaintiff. The only question is, whether, in case the Plaintiff obtains a Decree of Foreclosure against the Assignee alone, it can prejudice the Plaintiff that the Bankrupt was not a Party to the Suit. It is true, that an Equity of Redemption is an Interest in Real Estate; and it may be well to consider the general Question, whether the Bankrupt before the Bargain and Sale is a necessary Party to every Suit in which the Plaintiff asserts a Claim upon the Bankrupt's Real Estate against the Assignees. It must be admitted that the Real Estate of the Bankrupt is not formerly taken out of him until a Bargain and Sale is executed; but the effect of the Bankrupt Laws is immediately to vest the Real Estate of the Bankrupt potentially, though not formally, in the Assignees. They can call for the formal Transfer at their pleasure, and the Real Estate of the Bankrupt is as much bound by the Contracts of the Assignees before the Bargain and Sale, as it is afterwards. Before the Bargain and Sale, therefore, all beneficial Interest is out of the Bankrupt, and he differs from every other Person who in form retains a legal Estate; that he has no power of affecting that Estate; and that it passes from him, not by his own act, but by the act of others, and without his will. Having thus neither interest nor power in the subject of the Suit, which requires to be bound by the Decree of the Court, it is difficult to conceive any principle upon which he can be considered as a necessary Party. If it be said there is a possibility that the Bankrupt may hereafter acquire the Property of his Real Estate, unconverted, by payment of 20s. in the pound to his Creditors, the answer is, that such a mere possibility is not an Interest; and that in the mean time his Estate is fully represented by his Assignees, and is bound by their Acts alone out of Court, and must be equally bound by their presence alone in Court. That a Bankrupt

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should be joined as a Party, Defendant to every Bill filed before a Bargain and Sale respecting his Real Estate, would be equally vexatious and oppressive to the Plaintiff and to the Bankrupt; to the Plaintiff, because the Expenses of the Suit would be increased by the presence of a party who could not pay him costs, and to the Bankrupt, because he would have no means of defence, and no interest to defend. If, however, it could be generally necessary, that in a question respecting his Real Estate the Bankrupt should be a Party before the Bargain and Sale, it would not follow that he must be a Party to a Bill of Foreclosure. After a Mortgage in Fee no Estate is in form left in the Bankrupt. The Equity of Redemption is not an Estate, but an Interest, and may well be considered as substantially vested in the Assignees before a Bargain and Sale. Whatever, therefore, might be the case with respect to Real Estate, generally, it would be difficult to establish that it is necessary to give the Assignees a Title to redeem against the Mortgagee, that there should be a Bargain and Sale of the Equity of Redemption; and still more difficult to establish, that if the Estate were not worth redemption there should be a Bargain and Sale in order to give force to a decree of Foreclosure against the Assignees, or to a release from them of the Equity of Redemption.

Upon the whole, my Opinion is, that although there be no Bargain and Sale, a Decree of Foreclosure against the Assignees alone can never be impeached by the Bankrupt; and further, that although there be no Bargain and Sale, the Bankrupt can never impeach a Release of the Equity of Redemption, if the Assignees, in order to save the expense of a Suit for Foreclosure, should think fit to execute such a Release. It is said, that if the general point be against the Plaintiff, there are specialties which render it necessary here, that the

Bankrupt should be a Party. That the Bill charges a Fraud committed upon the Plaintiff by the Bankrupt, and that an Agent in a Fraud may be made a Party though he has no Interest. It is observable, however, that in the alleged Fraud the Bankrupt must have been the Principal, and not the Agent. In fact, however, the Bill is not framed with any such view, and does not charge the Bankrupt with any intention of Fraud in the matter complained of. It is next said, the Bill charges that Deeds and Muniments are in possession of the Bankrupt, and prays a delivery of them, and that for this purpose he is a necessary Party. The Bill, indeed, charges generally, that the Confederates have in their power Deeds and Papers; but this cannot be understood as making a Charge against the Bankrupt specially, and is rather to be referred to a possession of the Confederates, according to their Rights and Interests. The Demurrer, therefore, must be allowed.

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*Ex parte* ANNE PEPLOE WARD, Widow; *in re*  
THOMAS PEPLOE WARD, an Infant.

ON a Petition for a Reference to the Master, to ascertain whether *Thomas Peploe Ward* was an Infant, and a Trustee within the meaning of the 7th of *Anne c. 19*, the usual Reference was made, and in pursuance of the same the Master stated by his Report, "He had been attended by the Solicitor for the said Petitioner, and for the said *Thomas Peploe Ward*, the Infant; and the said Petitioner had laid a state of Facts before him, supported by the Affidavit of *Charles Barrett*, Gentleman, sworn the 29th day of November 1819, and the Affidavit of *Francis Edge Barker*, Gentleman, sworn the 13th

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15th Feb.

Premises were  
by Deed, dated  
the 3d January  
1765, conveyed  
in Trust for  
W. C. for Life,  
Remainder to  
A. P. B. in Fee,  
subject to an  
Annuity or Rent-  
charge of 400 L.  
to E. C. for Life,  
if she should

survive

survive W. C., and subject to a Term of 99 years, granted to J. B. and R. C. in Trust for securing the Rent-charge, with a Proviso, making void the Term on Payment of the Annuity, and subject also to a Proviso, that if W. C. should survive E. C. and marry again, he might appoint an Annuity of 100*l.* out of the Premises to the use of the Person he should marry. E. C. died, as did W. C. without executing the Power. Held, on Petition, under the 7 Anne, c. 19, that the legal Estate descended on the Infant Heir of the surviving Trustee, who as a Trustee within the Act, was directed to convey.

day of December 1819. He had proceeded on the said Reference, and found, that by Indentures of Lease and Release, bearing Date the 2d & 3d days of January 1765, the Release being of five Parts, and expressed to be made between *William Clowes*, and *Elizabeth* his Wife, of the first part; *John Peploe Birch*, and *Ann* his Wife (which said *Ann* is therein mentioned to be the only Child and Heir Apparent of the said *William Clowes* and *Elizabeth* his Wife) of the second part; *William Shaw*, therein described, of the third part; *John Bradshaw*, and the Rev. *Richard Clowes*, therein respectively described, of the fourth part; and *James Bayley* and *Edward Clowes*, therein also described, of the fifth part; and by a common Recovery, duly suffered in pursuance thereof, at the Lent Assizes holden for the County of *Lancaster*, in the year 1765, divers Messuages, Lands, Tenements and Hereditaments, were conveyed, limited and assured, To the use and behoof of them the said *James Bayley* and *Edward Clowes*, and their Heirs, Upon the Trusts, and to and for the several Uses, Intents and Purposes therein before mentioned and declared; that is to say, To the Use and behoof of the said *William Clowes*, for his natural Life, without Impeachment of Waste; Remainder to the use and behoof of the said *Ann Peploe Birch*, her Heirs and Assigns, for ever, subject to an Annuity, Rent-charge, or Annual Sum of 400*l.*, thereby given to the said *Elizabeth Clowes*, for her natural Life, if she should survive the said *William Clowes*, her Husband, and to the powers and remedies for the recovery thereof; and also subject to a Term of ninety-nine years thereby granted to the said *John Bradshaw* and *Richard Clowes*, in Trust for the better securing the payment of the said Annuity of 400*l.*, and to the powers and remedies therein mentioned for the recovery thereof, with a Proviso for making void the said Term of ninety-nine years, on full

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WARD, Widow,  
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payment to the said *Elizabeth Clowes*, her Executors, Administrators and Assigns, of the said Annuity of 400*l.* and all Arrears thereof; and all Costs, Charges, and Expenses relating thereto; and which Annuity hath since ceased by her Death; and also subject to a Proviso, enabling the said *William Clowes*, if he should survive the said *Elizabeth* his Wife, and be minded to marry again, by Deed or Will to grant and appoint any annual Sum, or yearly Rent-charge, not exceeding 100*l.* to be raised out of all or any part of the said Premises, unto or to the use of any Woman or Women, whom, after the decease of the said *Elizabeth* his Wife, he should marry, for the Life or Lives of such Wife or Wives only, for her or their Jointure or Jointures, and in lieu and bar of her and their Dower or Dowers, but which Power was never executed; and he found, That the said *William Clowes* and *Elizabeth* his Wife, have both long since departed this life: And that by an Indenture, bearing date on or about the 30th day of June, 1796, and expressed to be made between the said *John Peploe Birch*, and *Ann* his Wife, of the one part, and the Rev. *James Bayley*, Clerk, and *John Sedgwick*, of the other part; and by a Fine therein covenanted to be levied, and levied accordingly, the said Messuages, Lands, Tenements and Hereditaments were limited and assured to the use and behoof of such Person or Persons, for such Estate and Estates, and in such Parts, Shares and Proportions, manner and form, and with, under and subject to such Chief Rents, or other Rents, Provisoes, Restrictions, and Agreements, as they the said *John Peploe Birch*, and *Ann* his Wife, during their joint Lives, or the Survivor of them, by any his her or their Deed or Deeds in writing, with or without power of Revocation, to be by them, or the Survivor of them, signed, sealed, and delivered, in the presence of, and to be at-

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tested by, two or more credible Witnesses, should declare, direct, limit or appoint the same, with Remainder to the use and behoof of the said *Ann Peploe Birch*, her Heirs and Assigns, for ever, and to or for no other use, intent or purpose whatsoever.—That by Indentures of Lease and Release, bearing date respectively the 30th and 31st days of July 1800, the Release being of five parts, and expressed to be made between the said *John Peploe Birch*, and *Ann* his Wife, of the first part; *Richard Clowes*, of the second part; *George Lomas*, and *John Ridgway*, therein respectively described of the third part; *John Pilkington*, and *William Cross*, therein also described, of the fourth part; and the said *John Sedgwick*, therein also named, of the fifth part; and by a common Recovery suffered in pursuance thereof at the Assizes holden for the County of *Lancaster*, in August 1800, the same Tenements and Hereditaments were limited and assured to the use and behoof of such Person or Persons, for such Estate and Estates, and in such Parts, Shares and Proportions, manner and form and with, under and subject to such Chief, Quit and other Rents, Restrictions and Agreements, as the said *John Peploe Birch*, and *Ann* his Wife, during their joint Lives, or the Survivor of them, by any his, her or their Deed or Deeds in Writing, with or without power of Revocation, to be by them, or the Survivor of them, signed, sealed and delivered, in the presence of, and attested by, two or more credible Witnesses, should declare, direct, limit or appoint the same, with Remainder to the use of the said *Ann Peploe Birch*, her Heirs and Assigns, for ever :—That the said *John Peploe Birch* did some time since depart this life, leaving the said Petitioner, *Ann Peploe Birch*, his Widow, him surviving, who some time since entered into a contract with *Dorothy Clowes*, Widow, for the sale to her of a Messuage or

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Tenement and Hereditaments, part of the said Estates comprised in the above-stated Indentures; and upon investigating the Title of the Petitioner, *Ann Peploe Birch* thereto, it was discovered that the legal Estate of and in the Tenements and Hereditaments comprised in the Indentures of Lease and Release of the 2d and 3d days of January 1765, and the Recovery suffered in pursuance thereof, was thereby vested in the same *James Bayley* and *Edward Clowes*, and that no Re-conveyance thereof had ever been executed:—That the said *Edward Clowes* departed this life some time ago, leaving the said *James Bayley* him surviving, and that the said *James Bayley* also departed this life some time ago, without having by his Will, or otherwise, made any disposition of such Estates as were vested in him as a Trustee; and the said *James Bayley* having died without Issue, the said *Thomas Peploe Ward*, who was an Infant of the age of five years, or thereabouts, became his Heir at Law, the said *Thomas Peploe Ward* being the eldest Son of the Rev. *Thomas Ward*, late of *Shotwick*, Clerk, who departed this life on or about the 3d day of March 1818, and which said *Thomas Ward* was the eldest Son and Heir at Law of the Rev. *Thomas Ward*, deceased, and *Ann* his Wife, and which said *Ann Ward* was formerly *Ann Bayley*, Spinster, and was the only Child and Heir at Law of *Samuel Bayley*, who died several years ago, and which said *Samuel Bayley* was the eldest Brother of the said *James Bayley*, the surviving Trustee named in the said Indentures of the 2d and 3d days of January 1765, as by the Pedigree annexed to the said Report would appear; and that under the circumstances aforesaid the said *Ann Peploe Birch* submitted that the said *Thomas Peploe Ward* was an Infant Trustee, within the meaning of the Statute in that case made and provided, of all the Estates com-



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*in re*  
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prised in the said Indentures of January 1765 ; and that the said Petitioner, *Ann Peploe Birch*, was desirous that the said Infant should convey the legal Estate, not only in the said Messuage, Tenements and Hereditaments so contracted to be purchased by the said *Dorothy Clowes* as aforesaid, to her, or to a Trustee for her, but also that the legal Estate in the rest of the Tenements and Hereditaments comprised in the said Indenture of the 2d and 3d January 1765, should be conveyed to *Charles Barrett* of *Manchester*, Gentleman, as a Trustee for the said Petitioner *Ann Peploe Birch*. He had considered of the said state of Facts, and the Evidence in support thereof, and was of opinion, That the Uses raised by the Deed of the 3d day of January 1765, expired with the Annuities for payment of which they were raised ; and that no legal Estate decended to the said *Thomas Peploe Ward*, the Infant ; and therefore he is not an Infant Trustee within the intent and meaning of the Act of Parliament of the 7th of Queen *Anne*."

To this Report an Exception was taken, and the same came on to be argued.

I was not present at the Argument. No Judgment was delivered, but an Order, during the Holidays, was sent to the *Registrar* on the 15th Feb. 1821, by which the Exception was allowed ; and it was declared that *Thomas Peploe Ward*, the Infant, was a Trustee within the Act, and that he should convey.

WILLIAM BUSHBY v. JAMES MUNDAY,  
JEREMIAH CLOVES AND C. W. CRACROFT.

20th & 28th Feb.  
5th & 8th Mar.  
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THE Bill was filed to set aside a Bond for 5,000*l.* and Interest given by the Plaintiff, to *Munday*, as a Trustee for *Cracroft*, in part satisfaction of a Sum won at Play by *Cracroft*, of the Plaintiff, which Bond *Cloves* had purchased of *Munday* for 4,000*l.* Injunctions *nisi* had been obtained against *Cloves* and *Munday*, and a Motion was now made (without prejudice to the exceptions taken and allowed to the Answer of the Defendant *Munday*), that the injunctions already granted might be extended to stay any proceedings by or on behalf of *Cloves* or *Munday*, in the Court of Session, or otherwise, in *Scotland*, against the Plaintiff or his Estate, upon or by virtue of the Bond in question in this cause; and notice was given that the Answer of *Munday* (though excepted to) and the Answers of *Cloves* and *Cracroft* would be read upon the Motion.

Injunction  
granted, under  
the circumstan-  
ces, to restrain  
Proceedings in  
the Court of  
Session in  
Scotland.

Mr. *Bell* and Mr. *Duckworth*, in Support of the Motion:—

*Cloves* is proceeding in his own name, in *Scotland*, upon the Bond assigned to him; he will have an advantage in the Suit there which he would not have here. Here he took the Assignment of the Bond subject to all the Equities which the original Obligee was subject to, and the Answers of *Cracroft* and *Munday* might be used as evidence; no such advantage could be had in *Scotland*; there, those Answers could not be read as Evidence; nor is there, that we are aware, any mode in *Scotland* of eliciting a discovery similar to a Bill of Discovery in this Court.

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Mr. *Hart*, Mr. *Heald*, and Mr. *James*, *contra*:—

The *Scotch* Courts had jurisdiction of the Suit first, and the jurisdiction of the Court of Session, which hath both legal and equitable Powers, is sufficiently ample to compel every necessary discovery. The Plaintiff is a *Scotchman*, and has Real Estates in *Scotland*; the proceeding there was proper, more especially as *Bushby* was abroad, and out of the jurisdiction, and no effectual Proceedings could be had in the *English* Courts. Can this Court stop Proceedings in *Scotland*?

*Vice-Chancellor*:—I think it may. Let this Motion stand until the next Seal, and let Inquiries in the mean time be made of the *Scotch* Lawyers, whether the Court of Session admits Answers to a Bill of Discovery in this Court, to be read there as Evidence, and if not, whether they have the means, in the Action now pending there, of compelling a Discovery.

5th March.

The Motion came on again this day, and an opinion of Mr. *Cranstoun* was read by Mr. *Bell* (a).

(a) The Case submitted to Mr. *Cranstoun*, and his Opinion, were as follow:

#### C A S E.

*William Bushby* v. *James Munday*, *Jeremiah Cloves*, and *C. W. Cracroft*.

In May 1820 the Defendant *Cloves* raised and executed a Summons before the Court of Session against the Plaintiff (who is Proprietor of a Landed Estate in *Scotland*), founded

upon a personal Bond, in the *English* form, dated 26th April 1819, granted by the Plaintiff to the Defendant *Munday*, and assigned by him to the Defendant *Cloves*, for the penal sum of 10,000*l.*, conditioned for the payment of 5,000*l.* with Interest, at the rate of 5 per cent. per annum, on the 15th April 1820; and the Summons concludes for payment of the said Sum and Interest. Upon this depending Action an Inhibition was also raised and

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*Scotland*, a Party in the Cause may be examined, and is an objection to that course if the party who

against Mr. *Bushby*; days had to run in place of Mr. *Bushby's* being in *Scotland*, the was not called in Court number last.

Plaintiff *Bushby*, 15 July and a Bill in the Court Chancery in *England* against Defendants *Munday*, *Croves*, *Croft*, stating, among other things, that on 15th Feb. 1819, Plaintiff had lost at Play the sum of 9,719*l.*; that on 25th April 1819, the Plaintiff executed a Bond, in the form, in favour of the Defendant *Munday*, in the penalty of 10,000*l.* conditioned for payment of 5,000*l.* on 15th April 1820; that 5,000*l.* was paid by *Munday* to the Plaintiff upon his executing the Bond; but that this 5,000*l.* was not proper Money of the Plaintiff, who further requested that the Defendant *Munday* should be given by him to the Plaintiff, upon the execution of his Bond, in order to complete the Transaction the subject of an actual Loan from the Defendant *Munday* to the Plaintiff; that this was thereupon imme-

diately, on its being received by the Plaintiff, handed over by him to the Defendant *Croft*, in part of the said 9,719*l.* lost at Play as above mentioned; that immediately afterwards the Defendants, *Croft* and *Munday* went with the Plaintiff's said Bond to one *Josiah Taylor*, who had engaged to find a Purchaser for it; but that after some Consideration, an Objection was taken, because the Bond did not bear Interest, and in consequence thereof the Defendant *Munday*, on 25th April 1819, applied to the Plaintiff to give him a meeting, which accordingly took place on the following day, when *Munday* requested the Plaintiff to give him another Bond for 5,000*l.* bearing Interest at 5 per cent. instead of the former one, upon his giving up the former one, and paying the Expense of the new Bond, and the year's Interest upon the 5,000*l.*; that this was accordingly done by the Plaintiff, the new Bond being for payment of 5,000*l.* and Interest on said 15th April 1820, and dated 26th April 1819. That on the day after the execution of this new Bond the Defendant *Munday* executed an Assignment thereof to the

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examines is to stand or fall by such Examination. This Court has a concurrent jurisdiction as with the

Defendant *Cloves*, in consideration of 4,000 l. paid by *Cloves* for the same, and which 4,000 l. the Defendant *Munday* immediately paid over to the Defendant *Cracroft*, for whom he was merely a Trustee in the whole of this Transaction. And the Bill therefore prayed, that all the said three Defendants might fully answer upon Oath the several Interrogatories therein contained; and that the said Bond of 26th April 1819 might be declared null and void; and that the said Defendants *Munday* and *Cloves* might be decreed to deliver the same up to be cancelled, and that in the mean time they might be restrained by Injunction from prosecuting any Proceedings upon the said Bond, either in *Scotland* or in *England*. After the filing of the above Bill, Injunctions, for want of Answer, were issued against the Defendants *Munday* and *Cloves* respectively, to restrain them from any Proceedings at Law in *England* against the Plaintiff upon the Bond in question, and these Injunctions are still in force. The several Defendants have lately put in their Answer upon Oath to this Bill; but the Defendant *Munday's* Answer has been found in-

sufficient, and he must therefore put in a further Answer thereto. The Defendant *Cloves* having brought the Action raised by him before the Court of Session against the Plaintiff into Court, the following Defences were, on the 11th December 1820, given in for the latter; viz. "The Bond sued for was granted for Money won at Play, and no Action therefore lies for the same; and besides, its validity is now the subject of a Bill pending in Chancery in a Suit between the Parties." And the *Lord Ordinary*, upon hearing the Counsel for the Parties of this date, appointed Mr. *Bushby* to give in a Condescendence of the Facts he alleged and offered to prove in support of his Defences. This Order having been peremptorily renewed, was lately complied with; and *Cloves* has not yet had time to give in Answers to the Condescendence. The Plaintiff *Bushby*, on the 20th February 1821, made a Motion before the *Vice-Chancellor*, praying that the Injunctions already issued as above mentioned might be extended to stay any Proceedings by or on behalf of the Defendants *Cloves* & *Munday*, or either of them, in the Court of Ses-

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Court of Session, to order Deeds to be delivered up, and this Court will order a Deed to be delivered up, in

sion or otherwise, in *Scotland*, against the Plaintiff or his Estate, upon or by virtue of the Bond in question. And this Motion, after some Argument, was ordered to stand over until the 8th March next, for the purpose of enabling the Parties to obtain, in the mean time, correct information as to the practice of the Court of Session in regard to certain Points upon which it appeared desirable that his Honor the *Vice-Chancellor* should be more fully informed. It is proper to state, that according to the Law of *England* any Action upon the Bond in question must be in the name of *Munday*, the Person to whom it was granted, and not in the name of *Cloves*, to whom it has been assigned; and upon the Trial of any such Action against Mr. *Bushby*, it would be competent to him to read the Answers of the Defendant *Munday* to the Bill thus filed in Chancery, one object of which is to obtain a full Discovery upon Oath from the several Parties. It is understood that the practice of the *Scotch* Court differs widely from the *English*, not only by sustaining the Action in the name of *Cloves*, the Assignee, in place of *Munday*, to whom the Bond was

granted, but also as to the way in which the Evidence of *Munday* and *Cracroft* can be obtained, and the effect of examining *Cloves* upon Oath.

With a view to the further Proceeding in the Motion above mentioned, and for the information of the Court of Chancery, your opinion is requested :

1. Whether both or either of *Munday* and *Cracroft* are competent Witnesses for Mr. *Bushby*, by the Law of *Scotland*, in the Action before the Court of Session at *Cloves's* instance ?

2. If they are competent Witnesses, in what manner their Evidence can be obtained; and whether, as they do not reside in *Scotland*, and of consequence are not subject to the Jurisdiction of the Court of Session, there is any means by which they can be compelled to give Evidence in that Action ?

3. Whether the Answers upon Oath of *Munday* and *Cracroft*, or either of these Answers to the aforesaid Bill in Chancery, could be used as

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a clear case, without sending it to Law; *Newman v. Milner* (b); *Jervis v. White* (c). A Bond is an *English* Security, and a discharge from it Abroad could not be pleaded here; as was held in *Smith v. Buchanan* (d).

Evidence in the Action before the Court of Session? And,

whether an *English* Magistrate would enforce their attendance on that Commission.

4. In what manner *Cloves* could be examined upon Oath in that Action, which, it will be observed, is at his own instance, and what would be the effect of such Examination?

3. The Answers upon Oath of *Munday* and *Cracroft* to a Bill in Chancery cannot be used as Evidence in the Action at the instance of *Cloves* against *Bushby* in the Court of Session.

#### OPINION.

1. I am of Opinion that *Munday* and *Cracroft* are competent Witnesses for Mr. *Bushby*, by the Law of *Scotland*, in the Action before the Court of Session at *Cloves*'s instance. Thus, in the Case of *Campbell* against *Pringle*, 9th Feb. 1731, the Oath of an Indorser was sustained against an Indorsee, to prove that a Bill was for Money won at Play.

2. There is no means by which *Munday* and *Cracroft* can be compelled to give Evidence in the Court of Session, as they reside without the Jurisdiction of the Court. A Commission will be granted for their examination in *England*; but I do not know

4. *Cloves* cannot be examined upon Oath, unless Mr. *Bushby* refer the Cause to his Oath. His Deposition in that Case is not held as Evidence, and its truth or falsehood is immaterial. The reason is, that Reference is a judicial Contract between the Parties that the Cause shall be so decided. But though *Cloves*, the Pursuer, cannot be examined upon Oath, his Judicial Declaration may be taken, with permission of the Court, *ad remandam veritatem*. I am inclined to think that the Court would allow him to be judicially examined in the Circumstances of the Case.

Geo. Cranston.

(b) 2 Ves. jun. 483.

(c) 7 Ves. 413.

(d) 1 East, 6.

If an Action be brought in a foreign Court, on an *English* Security, this Court will, if necessary, stay proceedings. Besides, the invalidity of this Bond arises out of an *English* Act of Parliament, which invalidates Securities for Money won at Play. In different countries different policies prevail; what the Law is as to Gaming Securities in *Scotland* must be found in that Law; it may be very different from ours: *English* Courts are the most proper Forums for the construction of *English* Acts of Parliament. Suppose a Note given in respect of Goods smuggled from France, it would be invalid here, but the French Courts might adjudge it good; and would not this Court permit a Bill to be filed here to have it delivered up, and to restrain proceedings in *France*? In this Country, the Assignee of a Bond takes subject to all the Equities as between the Obligor and Obligee; in *Scotland*, the rule is not so strict. Here, we may ask to have the Bond delivered up; in *Scotland* no such relief is given. Here, we may avail ourselves of the discovery afforded by *Munday's* and *Cracroft's* Answers, but in the Suit in *Scotland* we cannot; there, they are not evidence. They say, that in *Scotland*, *Munday* and *Cracroft* may be examined as witnesses; but suppose they are not in *Scotland*; but then it is said, if they are not within the jurisdiction, a Commission may be issued for their Examination: but suppose they refuse to give evidence under the Commission, what means are there of compelling them to do so?—None. This, therefore, is a Case which requires to be tried in an *English* Court of Justice; and it would be acting as ancillary to an evasion of the Act of Parliament to suffer the Suit in *Scotland* to proceed. In *Wharton v. May (e)*, the Decree directed

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(e) 4 Ves. p. 71.



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that the Defendant should be restrained from entering up any Judgment, or carrying on any Action in the Court of Great Session in *Scotland*, on their Securities.

Mr. *Hart*, Mr. *Heald*, and Mr. *James*, *contra*:—

The Assignee of the Bond, Mr. *Cloves*, denies by his Answer that he knew the Bond was given in respect of a Gaming Debt. He sues in *Scotland*; he had a right to do so, because the Obligor is a Scotsman, is a Scots Proprietor, and being Abroad is not amenable to the jurisdiction of the English Courts. *Bushby*, as a Scotsman, and a Scots Proprietor, is amenable to the Jurisdiction of the *Scotch* Courts, although resident Abroad (*f*); and though *Cloves* might proceed against *Bushby* in this Country (if he had a Domicile here), it was more natural that he should proceed in *Scotland*, as *Bushby's* only means of payment, his Heritable Estate, was in *Scotland*. They say *Munday* and *Cracroft* may not be examinable as Witnesses; that they may be Abroad; and that their Answers in the Suits instituted here are not Evidence in the Suit in *Scotland*. It may be admitted those Answers are not Evidence there; but Mr. *Cranston*, in the opinion adverted to on the other side, says, that the Court of Session has very ample, legal and equitable Powers, and may examine the Plaintiff and Defendants in the Action in *Scotland* as to the transaction. They may be examined either in Court, or under a Commission; *Munday* and *Cracroft*, therefore, may be so examined. The Court of Session, it is true, cannot compel Witnesses resident beyond its Territory to attend for Examination; but it is presumed that *English* Courts would enforce the *Scotch* Warrant in the same way as the Judge Ordinary in *Scotland* would

(*f*) Ersk. Inst. B. 1. T. 11. s. 19.

enforce an Examination under an *English* Commission. They have the means, therefore, of eliciting the whole circumstances of the Case. What should we say of the Court of Session, if it restrained a proceeding here, because a Witness was absent from *England*? It cannot be doubted that *Cracroft*, wishing to serve his friend *Bushby*, joins with him in the endeavour to vitiate this Bond; and no doubt they are very anxious to have the benefit of his Answer. Suppose a great Mercantile house in *Scotland* has acceptances remitted to it, and it sues the Acceptors in the *Scotch* Courts, could this Court restrain those Suits? It would be a singular state of international Law if that were permitted. After a delay of seven years in this Court, a Party might have the consolation of being remitted back to the Courts of *Scotland*, as the proper Forum for redress. Suppose a Bond be void in *England*, and yet good in *Scotland*, what is to prevent a proceeding in *Scotland*? No Authority is cited to the contrary. The Action in *Scotland* was before the Bill was filed here, and there is no reason or authority for intercepting its progress by Injunction. If in any case it appears to the Court of Session that two Suits exist, one in *Scotland* and one in *England*, on the same subject, its inquiry is, whether there was truly a *lis alibi pendens*, a Suit previously instituted in a foreign Court, competent to try the question; if so, that Court dismisses the *Scotch* Suit. According to the information we have received from *Scotland*, we find that the Court of Session has Jurisdiction to order Deeds to be delivered up; its authority is most extensive; next to the House of Peers it has the most extensive Jurisdiction of any Court in the Kingdom; it is supreme over all *Scotland*, and unites all the Powers both of a Court of Law and a Court of Equity. It can compel a Plaintiff or De-

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fendant to produce every Document, under the highest penalties, and to declare them void and ineffectual if not produced. It has an absolute control over the Litigants as to the discovery of facts; it can compel, under a penalty, a discovery of every fact relevant to the Issue in the Cause before it. So, as to Witnesses, that Court has all the Powers which *English* Courts have, of enforcing their attendance within their own Territory or Jurisdiction; and if they are, by the improper interference of either of the Litigants, kept back, or prevented from giving their attendance, the Court punishes the guilty party by a fine, or forfeiture of his Suit. It is plain, therefore, that complete justice may be done in the Court of Session in *Scotland*, in the Suit instituted there prior to that instituted here, and being first in possession of the subject matter of the Suit, and a lien being by such Suit obtained on *Bushby's* Scotch Estate, it would be a violation of the principles of international Law to stay the Suit there by the Injunction of this Court; and it may be doubted whether the Court of Session would consider itself bound by the Injunction of this Court.

The VICE-CHANCELLOR:—

The Defendant *Cloves* having raised an Action in the Court of Session in *Scotland* against Mr. *Bushby*, in order to enforce the payment of this Bond out of an Estate in that Country, the present Suit is instituted by Mr. *Bushby*, in this Court, against Mr. *Cloves*, Mr. *Munday* and Mr. *Cracroft*, for the purpose of having this Bond delivered up to be cancelled. And the question before me is, whether this Court shall permit the Defendant *Cloves*, pending the proceedings here, to prosecute this Suit in *Scotland*. Over the Court of Session in *Scotland* this Court has not, nor can pretend to have, any Autho-

rity whatsoever. The Court of Session is an independent Court, which happens to have a jurisdiction upon the matter of the Suit, from the circumstance that Mr. *Bushby* has an Estate in *Scotland*; and the question in this Court is the same, and must depend upon the same principles, as if the foreign Court thus exercising its independent jurisdiction were sitting, not at *Edinburgh*, but at *Paris*, or *Vienna*. Where Parties Defendants are resident in *England*, and brought by subpoena here, this Court has full Authority to act upon them personally with respect to the subject of the Suit, as the ends of justice require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other Court of Justice, whether in this Country, or in a foreign Country. If a Defendant who is ordered by this Court to discontinue a proceeding which he has commenced against the Plaintiff, in some other Court of Justice, either in this Country or Abroad, thinks fit to disobey that order, and to prosecute such proceeding, this Court does not pretend to any interference with the other Court; it acts upon the Defendant by punishment for his contempt in his disobedience to the Order of the Court; and if he continue contumacious, and ultimately obtain a Judgment in the other Court, it will protect the Plaintiff here against the consequences of that Judgment; and this Authority is ordinarily found fully adequate to the purposes of Justice. In this view of the case, the only present consideration is, whether the ends of Justice do require that pending the proceedings here it should not be permitted to the Defendant *Cloves* to prosecute the Action in *Scotland*. The Action in *Scotland*, and the Suit here, both involve precisely the same question,—whether by the Law of *England* the Defendant *Cloves* has a right to recover upon the Bond in question? The ultimate

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consequence of the two proceedings is not however necessarily the same. The Plaintiff Mr. *Bushby* may succeed in his defence in *Scotland*, and still be exposed to future proceedings upon the Bond. But if Mr. *Bushby* establish his case here, the Bond itself will be delivered up to be cancelled, and he will be absolutely relieved from all future proceedings. It must be admitted, that this Court is a more convenient Jurisdiction for determining the question, whether the Defendant *Cloves* has by the Law of *England* a right to recover upon the Bond in question, than the Court of Session in *Scotland*; and it is truly stated, that the proceeding there is less likely to elicit the truth of the case than the proceeding here, because there Mr. *Bushby* cannot have the benefit of Mr. *Munday*'s admissions upon his Oath, and because Mr. *Munday* and Mr. *Cracroft* being both resident out of *Scotland*, Mr. *Bushby* cannot compel their testimony as Witnesses. If therefore the Court of Session should happen to come to a conclusion upon the Case as made before it, that the Defendant *Cloves* has by the Law of *England* a right to recover upon the Bond, it would be in vain to urge that this Court ought to be concluded by that Judgment. The substantial ends of Justice would require that this Court should pursue its own better means of determining, both the law and the fact of the Case; and it would necessarily follow that it must bind the interests of the Parties by its own conclusions. If the opinion of this Court did not concur with that of the Court of Session, the Defendant *Cloves* must be restrained by the Injunction of this Court from taking the fruit of his Judgment there. And if the opinion of this Court did concur with that of the Court of Session, the Defendant would have the fruit of that Judgment, not by the proper force of that Judgment, but because he was entitled to it by the opinion of this

Court. Since, therefore, this is a Case which must be fully investigated and finally decided here, I think the ends of Justice do require that it should not be permitted to the Defendant *Cloves* to harass the Plaintiff by the further prosecution of the Suit in *Scotland*. There is however one effect which the Suit in *Scotland* may have, which must be fully reserved to the Defendant *Cloves*; I mean the preferable lien which he may acquire by it on the Land in *Scotland*, if he should ultimately establish any demand on the Bond. The Plaintiff Mr. *Bushby* must submit to such steps in *Scotland*, either by Judgment, or otherwise, as will secure to the Defendant *Cloves* the benefit of that priority, subject always to the future direction of this Court. With respect to an argument that might be used against the power of the Court to grant this Injunction, derived from the 19th Article of the Act of the Union, I must state that my mind is in no degree affected by it. The Articles meant to provide that after the Union the Courts of *Scotland* should continue as absolutely independent of the Courts in *England* as they were before the Union. If the Act of Union had never been made, this Court would have granted this Injunction, which in no manner breaks in upon the absolute independence of the Court of Session, and touches only the Party affected by it.

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## RAY v. PUNG.

*Conveyance to G. R. his Heirs and Assigns, to such uses as J. R. should appoint; and in default of appointment to J. R. in fee, J. R. who was married, by Lease and Release and appointment, conveyed to a Purchaser. Quære, whether the Wife of J. R. if she survived him, would be entitled to Dower?*

**THIS** was a Bill for a specific performance of a Contract to purchase, by a Vendor of certain Lands against the Vendee. The Vendee demurred generally to the Bill. The question was, whether, under the circumstances, the Wife of the Plaintiff was dowable out of the purchased Lands in case she survived him?

The Case was thus:—By Indentures of Lease and Release 25th and 26th of September 1800, the Release between *William Brewster*, of the First Part; *Edward Green*, and *James Long*, of the Second Part; *Macro Brewster* and others, of the Third Part; *James Ray*, of the Fourth Part; and *Golding Ray*, the Elder (a Trustee for the said *James Ray*), of the Fifth Part; certain Lands, Tenements and Hereditaments in the County of *Essex*, were duly conveyed and assured to the said *Golding Ray*, his Heirs and Assigns, To the use of such Person and Persons, and of and for such Estate and Estates, and in such Proportion and Proportions, and for such Term and Terms of Years, and upon and under such Provisoos, Conditions, Limitations and Trusts, and subject to such Charge and Charges, and in such sort, manner and form, as he the said *James Ray*, by any Deed or Deeds, Writing or Writings, to be by him signed, sealed and executed in the presence of and attested by two or more credible Witnesses, should from time to time declare, direct, limit or appoint the same. And as to the Estate or Estates so to be appointed, if any should be, should respectively end and determine; and as to such Part and Parts of the said Premises whereof no such Declaration, Limitations or Appointment should be made, and in default of, and in the mean

time, until any such should be made, To the use of the said *James Ray*, his Heirs and Assigns, for ever. The said *James Ray* afterwards duly made and executed certain Indentures of Lease and Appointment, and Release, bearing date respectively the 29th and 30th March 1816; the Lease made between the said *James Ray* of the one Part, and the Plaintiff *Golding Ray* (a) of the other Part; and the Appointment and Release made between the said *James Ray*, of the First Part, the Plaintiff *Golding Ray*, of the Second Part, and *Alexander Fordyce Miller*, of the Third Part, and which said Indenture of Appointment and Release was duly signed, sealed, and delivered by the said *James Ray*, in the presence of two credible Witnesses, who duly attested the signing, sealing and delivery thereof by the said *James Ray*, on the back of the same Indenture. By which said Indenture of Appointment and Release It is witnessed, that the said *James Ray*, for the valuable Consideration mentioned in the said Indenture, by virtue of the Power or Authority to him given by the said Indentures of the 25th and 26th Days of September 1800, and of all and every the Power and Powers him in anywise enabling in that behalf, by the now stating Deed or Writing, by him signed, sealed and executed in the presence of and attested by two credible Witnesses, did irrevocably declare, limit and appoint, that all and singular the said Lands, Tenements and Hereditaments, should, from and after the execution of the now stating Indenture by him the said *James Ray*, remain and be to the Uses, upon the Trusts, and for the Intents and Purposes thereafter limited, expressed and declared concerning the same; and by the same Indenture it is also

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(a) This is not the same Person as was named Trustee for *James Ray*, in the Deeds of the 25th and 26th Sept. 1800, but a different Person of the same name.



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witnessed, that for the Consideration aforesaid, and for further assurance, the said *James Ray* did grant, bargain, sell, release and confirm, unto the Plaintiff the said *Golding Ray*, in his Possession then being by virtue of the said Lease, and to his Heirs, the said Lands, Tenements, Hereditaments and Premises, To hold the same unto the Plaintiff, the said *Golding Ray*, his Heirs and Assigns, to the Uses, upon the Trusts, and for the Intents and Purposes thereafter expressed and declared concerning the same. And it was by the same Indenture declared, that as well the Appointment, as also the Grant and Release thereinbefore contained, should respectively operate and enure to certain Uses, and upon certain Trusts therein expressed and contained, in favour of the Plaintiff the said *Golding Ray*.

The said *James Ray*, at the time of the Execution of the Indentures of the 29th and 30th Days of March 1816, was married, and he and his Wife are still living.

The Plaintiff *Golding Ray*, afterwards, on the 20th June 1820, agreed to sell the Estate to the Defendant *Thomas Pung*. Part of the Purchase Money was paid by *Pung*, but he objected to complete his Purchase, on the ground, that the Wife of *James Ray* is entitled to Dower in case she survives her Husband, and therefore that the Title cannot be completed unless she joins in levying a Fine. The Plaintiff, in consequence, filed his Bill for a specific Performance, insisting he could make a good Title without a Fine.

The Defendant demurred generally to the Bill.

Mr. *Barber*, in support of the Demurrer:—

The Fee in this Case was vested in *Ray*, subject to

a Power in him to appoint the Fee. The Fee being vested in him, the Wife's right to Dower attached thereon, and he could not, by an Appointment under the Power, divest the Wife's right to Dower. It is clear the Fee vested until, and in default of, the Power; it was so held in *Cunningham v. Moody* (b), and also in *Doe v. Martin* (c). Upon the Fee thus vested in the Husband, a right to Dower attached in the Wife. Was it afterwards displaced by the Execution of the Power of Appointment? No Decision, perhaps, is exactly in point. The *Dicta*, with the exception of what is inferable from the Lord Chancellor's opinion in *Maundrell v. Maundrell*, are in favour of the Wife's claim to Dower. In *Goodhill v. Brigham* (d), there was a Devise to a Feme Covert in Fee, with a Power to dispose of the Estate without the control of her Husband, and the Power was held to be void; being considered as absorbed in the Estate in Fee. Mr. Serjeant *Le Blanc*, in that Case, defined a Power to be, "an Authority enabling one Person to dispose of the Interest which is vested in another; and Mr. Justice *Buller*, in his Judgment approved of that definition. In *Cox v. Chamberlain* (e), Lord *Alvanley*, advertng to *Goodhill v. Brigham*, says, "I do not conceive the Judges meant to decide that where there is a Conveyance to such uses as a Man shall appoint, and in default of Appointment, to his own right Heirs, the Party may not under the Power create an Estate that will supersede the Estate in Fee, though not perhaps to bar Dower. In *Maundrell v. Maundrell* (f), when the Case was before the Master

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(b) 1 Ves. 174.

(d) 1 Bos. & Pull. 192.

(c) 4 T. R. 39; but see the observations on that Case in *Smith v. Lord Camelford*, 2 Ves. jun. 707.

(e) 4 Ves. 631. See p. 637.

(f) 7 Ves. 567.

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*of the Rolls*, he held that a Husband having a Power of Appointment, and in default thereof an Estate for Life, Remainder to his Heirs, that if the Power was good, yet that a Purchaser taking by a Conveyance adapted to pass the Interest of the Estate, as a limitation of the Fee, and not as an Appointment, was subject to the Wife's Claim of Dower. In the Judgment, the *Master of the Rolls* says, "the Power of Appointment is merely nugatory, and nothing distinct or different from the Fee. The Fee was clearly in the Husband until Appointment. In *Goodhill v. Brigham* it was held that a Power added to the Fee was merely void. So the Power in this Case, followed by a Limitation in Fee, must be absorbed in the Fee, which includes every Power. The reason commonly given why a Power may have effect, though limited to the Owner of the Fee, is, that he may appoint in a mode by which his legal Fee would not entitle him to convey. I give no opinion upon the sufficiency of that Reason. But in this Case it is to such Uses as he should by Deed or Will appoint; that is, by Deed or Will legally executed; and by those Instruments he might have passed the Fee, though nothing was said about the Appointment. The Limitation, therefore, operates purely as a Limitation of the Fee, and that Fee he could only convey subject to her right of Dower." That Decision is commented upon by the *Lord Chancellor* in *Maundrell v. Maundrell* (g), and certainly in the Judgment in that Case (h) *Lord Eldon*, in opposition to the doctrine in *Goodhill v. Brigham*, does express a decided opinion, that a Power capable of being executed may be reserved to the Person having the Fee; but the *Chancellor* does not say that the consequence of executing the Power would be to deprive the Wife of

(g) See 10 Ves. 246.

(h) Page 265.

**Dower.** In *Cross v. Hudson* (*h*), Lord *Thurlow* held, that where a Person has a Power to charge an Estate of which he was Tenant for Life, with intermediate Remainders, with a Contingent Fee to himself, and the Contingent Fee afterwards comes to him, the Power is merged. In *Wilde v. Forte* (*i*), *Cox v. Chamberlaine* was cited, but it was held that the Wife was entitled to Dower. *Roach v. Wadham* (*k*) will probably be cited on the other side, but there the Court proceeded under a mistake, by supposing Lord *Eldon* had expressed himself in a different manner than he really did.

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Upon these Authorities, therefore, it is sufficient to say, it is a matter of doubt whether the Power was not merged in the Fee; or if not merged, whether the Execution of the Power divested the Wife's right to Dower; and that a Purchaser cannot be compelled to take a Title involved in doubt.

*Mr. Preston, and Mr. Spence, contra:—*

The right to Dower was defeated by the execution of the Power. Where, as in the present Case, there is a Conveyance to such Uses as *A.* shall appoint; and in the mean time, and until he makes an Appointment, to the use of *A.* and his Heirs, *A.* has a qualified and determinable Fee, until by the exercise of the Power an Use vests in the Person in whose favour the Appointment is made; and by such Appointment the Right to Dower, which belonged to the Wife of *A.* is extinguished and gone. There can be no doubt that a Power and a Fee may well subsist in the same Person, and that the former is not merged in the latter. It was so held in

(*h*) 3 Bro. C. C. 30.      (*i*) 4 Taunt. 336.      (*k*) 6 East, 289.

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*Tickner v. Tickner* (*l*), and in *Sir Edw. Cleere's Case* (*m*); and it is surprising that a different doctrine should have been expressed in *Goodhill v. Brigham* (*n*). The Decision there was right, because, clearly, the Conveyance took effect out of the Wife's Interest in Fee, and not under her Power; but the opinion that the Power was merged in the Fee was certainly erroneous. Where there is a Power and Appointment, and also a Fee in the same Person, there, until the execution of the Power, and in default of execution, the Wife is entitled to Dower; but if the Power be executed the Wife's right to Dower is displaced. Such a mode of limiting an Estate has been resorted to by the most eminent Conveyancers, as a mode to enable a husband to defeat any Claim of Dower. Dower is a derivative Estate; and when the Estate of the Husband ceases, as it does under an execution of the Power, the Wife's right to Dower exists no longer; *cessante statu primitivo cessat atque derivativus*. The Vendee under the Power, according to *Sir Edw. Cleere's Case*, takes as if the Estate had been limited to him by the Deed creating the Dower (*p*). Lord

(*l*) 3 Atk. 742; see also *Kenyon v. Sutton*, cited in 2 Ves. jun. 600, 1. and *Notts v. Shirley*, cited in the note to 2 Ves. jun. 604.

(*m*) 6 Rep. 17 b; and see *Cunningham v. Moody*, 1 Ves. sen. 176. *Doe v. Martin*, 4 T. R. 39. *Doe v. Weller*, 7 T. R. 478. *Maundrell v. Maundrell*, 10 Ves. 256, where the Lord Chancellor says, "It cannot be represented as a question of any doubt, that

such a Power may be reserved to the Person having the Fee; and is capable of being executed. The extent to which the contrary proposition would go in affecting Titles is surprising, and therefore the statement of any doubt upon it is alarming." See also *Dobbins v. Bowman*, 3 Atk. 408. *Pescok v. Monk*, 2 Ves. 190.

(*n*) 1 Bos. & Pull. 192.

(*o*) 6 Co. 17.

(*p*) See also *Lady Graham's*

*Eldon* says in *Maundrell v. Maundrell* (q), the Fee vests until the execution of the Power, and the execution of the Power is a limitation of a Use under and by the effect of the Instrument by which the Power was reserved. When the Conveyance operates on the Fee alone, and there is no execution of the Power, Dower attaches, but when the Power is executed, the right to Dower is extinguished. In *Cave v. Holford* (r), Mr. Justice *Heath* says, that if such a Power as in this Case, is executed, Dower is defeated. In *Maundrell v. Maundrell*, Lord *Eldon* describes Mr. Justice *Heath* as a Judge eminently versed in the knowledge of Conveyancing. It may be admitted, that a Husband is entitled by the Curtesy when there is an Estate Tail, notwithstanding the determination of that Estate by the failure of Issue, as in *Sammes and Payne's Case* (s). It may also be admitted, as stated in that Case, that if an Estate determines by a springing or a shifting Use, the Husband is entitled to his Curtesy, notwithstanding the determination of the Estate of his Wife; nor is it denied, that when the Estate of the Wife is avoided by an executory Devise, the Husband has likewise been held entitled to his Curtesy, though the Estate of his Wife is determined, as was held in *Buckworth v. Thirkell* (t); which Case was confirmed by *Goodenough v. Goodenough* in 1775, (of which Mr. *Preston* said he had a Note (u);) but notwithstanding these analogous Cases, the long received

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case, Moore, 261. *Robinson v. Hardcastle*, 2 T. R. 241. *Venables v. Morris*, 7 T. R. 342; and see Mr. *Booth's* Opinion at the end of *Hilliard's* edition of *Touchstone*, and *Roach v. Wadham*, 6 East, 28.

(q) 10 Ves. 255.

(r) 3 Ves. jun. 657.

(s) 1 Leon. 167; S. C. 8 Co. 34. 1 And. 184. Goldsb. 81. See also *Flavek v. Ventrice*,

1 Roll's Abr. 676.

(t) 1 Collec. Jurid. 332.

3 Bos. & Pull. 652. S. C. noticed also Har. & But. Co. Litt. 241, a. note 4, edit. 17th. See also Mr. *Preston's* "Essay on the Quantity of Estates." 1st edit. 525.

(u) Mr. *Preston* has alluded to this Case in the 3d Vol. of his work "On Abstracts," p. 372.

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opinion of the Profession has undoubtedly been, that where the Estate ceases upon the execution of a Power, the Wife is not entitled to Dower. The Case which has been cited, *Wilde v. Fort*, cannot be considered as deciding the point; because it does not appear whether the Conveyance was of the interest, or by way of Appointment; if the former, there could be no doubt.

Mr. Sugden, *Amicus Curiae*:—The point in the present Case has been determined in *Moreton v. Lees*, in 1819, at *Lancaster*, by Chief Baron *Richards* and Mr. Baron *Wood*, on a Writ of Dower. It was there held that an appointment by the Husband in Fee divested the Widow's Right to Dower. The Case I had from the Briefs in the Cause (*x*).

*Argument continued*:—In that Case the Uses were clearly void. Before the Statute of Uses a man could not be a trustee for himself; nor can he be the *Cestui que Use* in Fee under a Conveyance to himself in Fee; nor can he have a Power over his own legal Fee when he is the *only Cestui que Use*. The Conveyance was to the Purchaser in Fee, to such Uses as he should appoint, and in default of appointment to himself in Fee. The Uses were void. The opinions of all Lawyers support that conclusion. If that Case had been fully argued, and correctly decided, it must have been ruled that the

(*x*) Mr. *Sudgen* has noticed this Case in the 2d edit. of his work "*On Powers*," p. 339. It is thus stated: The Widow brought her Writ of Dower, and the Defendants pleaded that the Husband was only seised by virtue of a Feoffment, dated 12th March 1787, whereby the Estate was granted to the Husband, and his heirs and Assigns, to such Uses as he should

appoint by Deed or Will; and for want, or in default of, and in the mean time and until, appointment, to the use of the Husband, his Heirs and Assigns for ever; and they also pleaded an appointment in Fee by him. A Verdict was found for the Plaintiff, subject to the opinion of the Court, and the Court upon argument decided against the Widow's Right.

Wife was dowable, since the Husband had the Fee at the Common Law, and the Uses were inoperative. That Case proves, however, that the Judges who decided it were of opinion that an appointment of the Fee under a Power, when there is a valid Power, defeats the Dower dependent on the Fee. All the Authorities agree that the Wife is dowable of the Fee; the only question is, whether she remains dowable of that Estate, after it has been defeated by the exercise of the Power, and therefore as the Fee is defeated, the Dower which is dependent on the Fee must also be defeated. And the Case of *Moreton v. Lees*, in the view which the Judges took of that Case, decides the point, though the point did not duly arise on that Case. The Conveyance operates as an execution of the Power, and all the same consequences follow as if the Power alone had been mentioned in the Conveyance.

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The VICE-CHANCELLOR:—

This is a question of great importance; it must go to Law.

*The Counsel on both sides* said, the Parties were anxious to avoid the expense of going to Law, and were desirous of resting on the opinion of the *Vice-Chancellor*.

The VICE-CHANCELLOR:—

As that is their wish, I will look into the Cases.

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The VICE-CHANCELLOR:—

This was the case of a Conveyance to *G. Ray*, his Heirs and Assigns, to the use of such Person and Persons, and for such Estate and Estates, as *James Ray*, by any Deed, &c. should declare, direct, limit, or appoint, and in default of appointment to the use of the said *James Ray*, his Heirs and Assigns for ever. *James*

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*Ray* sold to the Plaintiff, and thereupon executed his power of Appointment in favour of the Plaintiff. The Plaintiff has since contracted to sell the same Estate to the Defendant, and has filed this Bill for a specific performance of that Contract. The Defendant has demurred to the Bill, upon the ground that the Wife of *James Ray* may be dowable out of this Estate. The Question simply is, whether, when the Husband's Estate of Inheritance is determined by a shifting Use, and the Husband afterwards dies, leaving the Wife surviving, she is entitled to claim Dower against the Appointee of the new Use?

In favour of the Wife's Right there is the *dictum* of *Anderson*, in the case of *Sammes v. Payne* (z); there is also the doubt expressed by Lord *Alvanley*, in *Cor v. Chamberlain* (a); the Decision in the case of an executory Devise in *Buckworth v. Thirkell* (b), as to Tenancy by the Curtesy; and a similar Decision in a case of executory Devise, as to Dower, in *Greenwood v. Greenwood*, referred to in Mr. *Park's* Book (c). On the other hand, there is the expressed intimation of Lord *Eldon's* Opinion in *Maundrell v. Maundrell*, against the title of Dower; and in Mr. *Sugden's* Book on Powers, there is a Note of a case of *Moreton v. Lees*, said to have been lately decided in the Court of Exchequer, against the Dower.

These conflicting Authorities create too much doubt in the Question, to make it fit that this Court should bind a Purchaser without the further opinion of a Court of Law (d).

(z) 1 Leon. 168.

(a) 4 Ves. 631.

(b) 1 Coll. Jurid. 332.

(c) Park on Dower, 168.

(d) The Case was argued in

the Court of *King's Bench*, on the 31st October 1821. The Judges took time to consider their Certificate.

ATTORNEY GENERAL v. HARLEY.

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11th and 19th  
March.  
22 May.

THIS Cause now came on for further Directions on the *Master's* Report. It appeared, by the Report, that by Indentures of Lease and Release, dated the first and second days of February 1802, between *Michael Newton*, the late Husband of the Testatrix, and other Persons, and by virtue of four several Recoveries, certain Freehold Estates, in the Counties of *York, Middlesex, Gloucester, and Lincoln*, were conveyed, limited, settled and assured (subject to certain Estates for Life thereby limited to the said *Michael Newton*, and to *Susanna Countess Dowager of Oxford*, and Countess *Mortimer* and *Catherine Blundell*, with divers Remainders over to the Issue of their respective Bodies, as therein particularly mentioned and intended to be thereby corroborated and confirmed,) to the use of *Sir Charles Cotton*, *Sir James Graham* and *Benjamin Handley*, their Heirs and Assigns, for ever, upon Trust, that they or the Survivor of them, his Heirs or Assigns, should absolutely sell, convey and dispose of the same Hereditaments and Premises, and stand possessed of and interested in the Monies which should arise by such Sale, upon Trust amongst other things, after paying the several Charges and Incumbrances therein mentioned, to pay the sum of 5,000*l.* to the said *Michael Newton*, his Executors, Administrators or Assigns, with lawful Interest for the same, to be computed from the time of the decease of the Survivor of them the said *Michael Newton*, *Susanna Countess of Oxford*, and *Catherine Blundell*, and failure of Issue of their Bodies entitled or inheritable under the Limitations intended to be thereby confirmed or established, (being

*M. N. having several charges on Lands, by his Will directed his Trustees and Executors to convert all his Property into ready Money, and after payment of his Debts, Legacies, &c. to pay the Residue to his Wife, A. N.*

*A. N. by her Will, disposed of the Residue of her personal Estate, after certain Payments, to Charities. After her Death the charges on the Lands were paid off.*

*Held, that the Monies charged on Lands, did not pass to the Charities, but that such Bequest was void under Mortmain Act.*

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the Sum which he, the said *Michael Newton*, had already paid or engaged to pay for the Costs, Charges and Expenses of preparing and ingrossing the said Indenture, of suffering the said several Recoveries, and of levying the Fine thereafter mentioned, and for the Fines and Fees incidental to the renewal of the Leases for Lives thereinbefore and thereafter mentioned); and in the next place to pay the sum of 12,000*l.* unto the said *Michael Newton*, deceased, his Executors, Administrators and Assigns, with legal Interest for the same, as therein mentioned; and, in the next place, to pay the sum of 12,000*l.* unto the said *Charlotte Pigott*, her Appointees, Executors or Administrators, as therein particularly mentioned; and in the next place to pay the sum of 10,000*l.* unto such Person or Persons, for such intents and purposes, and in such manner as the said *Charlotte Pigott*, notwithstanding her Coverture, by any Deed or Deeds, Writing or Writings, to be sealed and delivered by her in the presence of and attested by two or more credible Witnesses, or by her last Will and Testament in writing, or any Writing in the nature for, purporting to be her last Will and Testament, or any Codicil thereto, to be signed and published by her in the presence of two or more credible Witnesses, should direct, limit or appoint the same; and in default of such declaration, direction, limitation or appointment, to pay the same, or so much thereof concerning which no such declaration, direction, limitation or appointment should be made, into the proper hands of the said *Charlotte Pigott* if living, or if dead, then to her Executors or Administrators, as part of her Personal Estate. *Charlotte Pigott* afterwards, by Indenture of Three Parts, bearing date the 16th August 1803, and made between the said *Gillery Pigott* and *Charlotte*

*Pigott* his Wife, of the First Part; the said Sir *Charles Cotton*, Sir *James Graham* and *Benjamin Handley*, (Trustees of the said Indenture of the 2d February 1802,) of the Second Part; and the said *Michael Newton*, of the Third Part; in consideration of a certain Annuity of 500*l.* per annum, thereby agreed to be paid to her by the said *Michael Newton*, during the joint Lives of him the said *Michael Newton*, and the Survivor of them the said *Gillery Pigott* and *Charlotte* his Wife, and secured as in the said Indenture is particularly mentioned, duly direct, limit and appoint the sum of 6,000*l.* part of the aforesaid sum of 10,000*l.* in case the same should become raiseable and payable under the Trusts of the said Indenture of Release; together with all Interest to be raised or payable in respect of the said sum of 6,000*l.* unto the said *Michael Newton*, his Executors, Administrators and Assigns, to and for his and their own absolute use and benefit; and the said *Charlotte Pigott* did, by virtue of such Powers and Authorities as were vested in her in and by the said Indenture of the 2d February 1802, direct the said Sir *Charles Cotton*, Sir *James Graham* and *Benjamin Handley*, and the Survivors and Survivor of them, and the Trustees for the time being for the sale of the said Hereditaments so made saleable, in the events and in manner aforesaid, to raise, pay and apply the said sum of 6,000*l.* and Interest unto the said *Michael Newton*, his Executors, Administrators and Assigns accordingly. *Michael Newton* afterwards, on the 4th day of November 1803, died, leaving a Will, dated the 23d day of December 1800, whereby, after specifically bequeathing to his Wife, *Ann Newton*, a Leasehold Dwelling-house in *Harley-street*, and certain Personal Effects therein mentioned, gave and bequeathed unto Sir *Thomas Whichcote* and *Benjamin Handley*, (the Trustees and Executors named

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in the said Will,) all and every other the Messuages, Lands, Tenements and Hereditaments whatsoever, and all and every his Goods, Chattels, Stocks, Funds, Monies, Mortgages and Securities, and all other his Personal Estate whatsoever, (except as therein excepted ;) upon Trust, so soon as conveniently might be after his Decease, to sell the same Messuages, Lands, Tenements and Hereditaments, and also to sell and convert into ready Money all such parts of his Personal Estate and Effects as should not consist of Money, and to get in all such parts thereof as did consist of Monies and Securities for Money, and to pay, apply and dispose of the Monies to arise therefrom in manner and for the purposes thereafter mentioned ; (that is to say) in payment of his the said Testator's Debts ; and also of a certain Annuity and pecuniary Legacies therein mentioned ; and after full payment, satisfaction and discharge of the said Debts, Legacies, Funeral and Testamentary Expences, and investment of a sufficient Sum to answer the said Annuity, then upon Trust to apply and dispose of the full and clear residue of the Monies which should arise and be received and come to their hands from his Real and Personal Estates by virtue of the said Will, unto his said Wife *Ann Newton*, to and for her own use and benefit. *Ann Newton*, by her Will, gave, " what remains of my Property, after paying my just Debts and Legacies, to be applied in the following manner :—To Hospitals, Schools and Charitable Institutions, for the benefit of Society, 100*l.* each, as far as it will go."

*Susanna* Countess of *Oxford*, and *Catherine Blundell*, both died in the life-time of the Testatrix, *Ann Newton*, without leaving any Issue, whereby the Estates, comprised in the said Indenture of Release of the 3d February 1802, became, under the Limitations therein

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contained, vested in the said Trustees thereof in trust for Sale. The two sums of 5,000*l.* and 12,000*l.* were not, nor was either of them, raised or paid; nor were the Estates charged therewith sold, or contracted to be sold, previous to the death of the Testatrix; but it was admitted before the *Master*, by the Defendant *Martha Harley*, that both the sums of 5,000*l.* and 12,000*l.* had since been received by her from the Executors of *Mich. Newton*, who received the same from the Trustees in whom the Estates charged therewith were vested, for the purpose of Sale. Some of the Debts of *Mich. Newton* remained unpaid when the 17,000*l.* was paid off. The Question was, whether the sums of 5,000*l.*, 12,000*l.*, and 6,000*l.*, were well bequeathed to Charity, or whether the Bequest was void under the Mortmain Act (*a*)?

Mr. *Hart*, and Mr. *Simpkinson*, for the Relators, and in support of the Charitable Legacies; Mr. *Shadwell*, and Mr. *Twiss*, for Parties in the same Interest.

The sums of 5,000*l.*, 12,000*l.*, and 6,000*l.*, bequeathed by *Mich. Newton* to his Wife, and by her given to Charity, were well bequeathed. Mrs. *Newton* in her Lifetime, or her Executrix after her Death, could not claim those Monies until the Debts of *Mich. Newton* her Husband were paid, and the previous Trusts of his Will performed. The Land, by the direction for that purpose in the Trust Deed, and in the Will of *Mich. Newton*, must be considered as converted into Money. Mrs. *Newton* took it as Personalty, and it passed to the Charities under the residuary Clause in her Will. *Middleton v. Spicer* (*b*), is in point. It appears by the Registrar's Book, that the Personal Estate was in that Case bequeathed to Charity, and the Money arising from

(*a*) 9 Geo. II. c. 36.

(*b*) 1 Bro. C. C. 201.

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certain Copyhold Estates, which the Testator had contracted to sell, was held to pass. Mr. *Brown's* Report is very short on that Question, nor does the Marginal Note mention it; but by the Registrar's Book it appears to have been raised, argued and determined; that Case therefore is strongly in point. The Survivor of the three Tenants for Life, mentioned in the deed of 1802, died a year and a half before Mrs. *Newton*; the Trustees should then have raised the Monies; if they had done so, and the Money had been paid over to Mrs. *Newton*, it would clearly have passed by her Will. Is then their breach of duty in not immediately raising the Money to have the effect of invalidating this Bequest? The Charities could not say, give us the Land and not the Money; they could not elect to have the Land. If a private Legatee had any claim to an Election, these Charities could have no such claim in the face of the Mortmain Act. All the Charities could do would be to call upon the Executors of Mrs. *Newton*, who must call upon the Executors of Mr. *Newton*, and they upon the Trustees. It is true, that in *Roper v. Ratcliffe* (b), it was held in the House of Lords, on appeal, that though Lands given in trust, or devised for the payment of Debts and Legacies, should be deemed in Equity as Money, in respect of the Creditors and Legatees, yet that it is not so in respect to the Heir-at-Law or Residuary Legatee, and that as regards them a Court of Equity will consider them as Lands; and accordingly, in that Case, the Residue being devised to Papists, it was considered as a void Devise; but that Decision gave great dissatisfaction, as is observed by Lord *Mansfield*, in *Foone v. Blount* (c). If Mrs. *Newton* had died intestate, the Money would have gone, not to her Heir, but to her personal Representatives.

(b) 9 Mod. 167.

(c) 2 Cowp. 464.

Mr. *Horne*, and Mr. *Farrer*, *contra*, were stopped by the Court.

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The object of the 9 *Geo.* 2, c. 36, as its Title imports, was to prevent Land becoming inalienable; but, in order to secure that object, the Legislature thought it prudent, not merely to prohibit Gifts of Land to Charitable Uses, but to prohibit Gifts to Charitable Uses of any interest in Land, being aware that, by circuitry and election, the Land itself might be acquired, in most Cases, as the result of an interest in Land. That Money to arise from the sale of Land is an interest in Land admits of no doubt; and it is plain, therefore, that Mr. *Newton* could not, by his Will, have devoted these Sums to Charitable Purposes. At the death of Mrs. *Newton*, these Sums were not raised, and the interest in the Land continued; and if Mrs. *Newton's* Will is to carry those Sums to Charitable Uses, it must of necessity pass to such Uses, and interest in Land. It can make no difference that Mrs. *Newton* had not the immediate personal right to call in these Sums. She took the property in these Sums, and the other Personal Estate of Mr. *Newton*, subject to his Debts and the Charges of his Will, and the Executors were but Trustees for her; and the Statute must equally apply, whether the interest in Land which subsisted at the death of Mrs. *Newton*, was in her immediate personal demand, or of her Trustees.



1821.

27th June.

*When Aver-  
ments in a Plea  
are necessary.*

## CORK v. WILCOCK.

ON the 21st March 1814 the Defendant gave his Promissory Note to the Plaintiff for 700 *l.* with Interest. The Note was not paid, and the Plaintiff in 1820 brought an Action upon it. The Defendant pleaded the Statute of Limitations, and the Plea was replied to, and Issue joined.

The Plaintiff by his Bill, stating the foregoing facts, further stated, that he was unable to proceed with safety to the trial of the Action, as the Defendant pretends he did not within six years next before the commencement of the Action promise to pay, and the Plaintiff is not in possession of admissible evidence to prove such Promise. The Bill then charged that the Defendant did on several occasions, subsequently to the 7th June 1814, and before the commencement of the Action, verbally promise and undertake to pay the Plaintiff the amount of the Note, and admitted that the principal Sum was unpaid, and also admitted to divers Persons that the Money was owing. A further Charge was, that on the 4th of July 1815, the Wife of the Defendant, as his Agent and with his privity, paid to the Wife of the Plaintiff, as his Agent, the sum of 35 *l.* for one year's Interest on the Note, up to the 21st March 1815; and that on the 3d June 1816, the Defendant, or his Wife, as his Agent, and with his privity, paid to the Plaintiff the further sum of 35 *l.* for one year's Interest upon the said Note, up to the 21st March 1816; and that on that occasion the Plaintiff repaid to the Defendant, or permitted him to deduct from the said sum of 35 *l.* the sum of 3 *l.* 10 *s.*, being

the amount of one year's Property Tax upon the said Payment. The Bill further charged similar Payments for Interest up to the 21st March 1817, and to the 21st March 1818, and that the Plaintiff, at the request of Defendant or his Wife, indorsed upon the Note receipts or acknowledgments in writing for each of the Payments as they were made. The Bill then charged, that the Defendant had been in the habit of keeping written accounts of his pecuniary Dealings and Transactions, and that he has or had Books of Account, written Accounts, Papers or Writings, in which he or some Person or Persons, as his Agent or Agents, hath or have made some Entries or Entry, Memorandums or Minutes, relating to the said sum of 700 *l.*, and to the several payments of Interest so made on account as before stated, or relating to some or one of these particulars; and that the Defendant is or was in possession of some Documents, Papers or Writings relating to the whole or part of the matters before stated, or to some of them, by which the truth would appear; and that the Wife of the Defendant informed him of the several Payments made as aforesaid, and that he never made any objection, or ever alleged or pretended that the Money was not due; and that the Plaintiff is unable to proceed to the Trial without a Discovery from the Defendant. The Bill *prayed* a Discovery and the benefit thereof, and that he might be allowed to give the same in evidence on the trial of the Action.

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The Defendant *pleaded* to part of the Bill, and *answered* part. The Plea, which was very long, stated in substance, that as to so much of the Bill as related to the alleged sum of 700 *l.* due, and the alleged payments of Interest, and except as to so much of the Bill whereby the Defendant is required to discover and set

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forth a List or Schedule of Books, &c.; and except as to so much of the Bill as sought a Discovery, whether the Wife of the Defendant did not inform him of the several Payments in the Bill mentioned, and whether he made any objection as to those Payments, or alleged they were not due, the Defendant pleaded the Statute of Limitations; and averred, that if the Plaintiff ever had any cause of Action, the same accrued above six years before the filing of the Bill, and above six years before the commencement of the Action; and then the Plea, by averment, denied the several facts stated in the Bill, and which were also denied by the Answer accompanying the Plea.

Mr. *Wray*, in support of the Plea; Mr. *Bell*, *contra*.

When the Case was opened, the *Vice-Chancellor* objected to the form of the Plea, as containing unnecessary Averments. It was urged, however, that the Plea was good according to the inclination of the *Lord-Chancellor's* Opinion in *Bayley v. Adams* (a); and *Baillie v. Sibbald* was also cited (b).

The VICE-CHANCELLOR:—

Where the Plaintiff in Equity seeks to avoid a legal bar upon equitable grounds, there the Defendant in Equity, pleading the legal bar, must, of necessity, accompany his Plea with Averments, generally denying the equitable matter; for otherwise there would be no fact to be tried upon his Plea, because the Bill admits the legal bar: and such a Defendant must nevertheless accompany his Plea with an Answer to all the special

(a) 6 Ves. 586. In this Case, are stated, as to the necessity of Averments in a Plea.  
all the Authorities, and especially that of Lord *Redesdale*, (b) 15 Ves. 185.

circumstances charged, as constituting the equitable ground, that the Plaintiff in the trial of the general Averments in the Plea may not lose the benefit of the Discovery from the Defendant.

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But this reason and rule as to Averments have no application to the present Case.

The object of the present Bill is to obtain a Discovery from the Defendant to be used at Law, in order to disprove the Plea of the Defendant there, that he has made no Promise within six years ; and this Discovery the Defendant is bound to give. But he has a right to protect himself in Equity, by the Statute of Limitations, from a Discovery as to the original constitution of the Debt, or whether it has since been paid. The proper course therefore is, for the Defendant to plead the Statute to such last-mentioned matters, and then to answer fully the rest of the Bill ; and to introduce Averments in the Plea, to the effect of the Answer, is a useless repetition of the same matter, and mere confusion as to the rule and use of Averments.

I must over-rule the Plea, but I will permit you to put in another Plea.

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The Cause was afterwards compromised.

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## SCOTT v. HARWOOD.

*Devise in favour of Children of Testator's Sister, held, on the construction of the whole of the Will, to apply to such Children only as were living at the Testator's Death, and not to include after-born Children.*

THIS Cause now came on for further Directions, and a Question arose on the Will of *E. S. Turner*, which was as follows :—

“ I give and devise unto and to the use of *William Tooke Harwood* and *William Dalrymple*, all and every my Freehold and Copyhold Estates, upon the Trusts nevertheless hereinafter declared of and concerning the same, (that is to say,) upon Trust that the said *William Tooke Harwood* and the said *William Dalrymple*, and the Survivor of them, and his Heirs, do and shall stand and be seised of the said Freehold and Copyhold Estates and Premises hereby devised, to the use and behoof of all and every the Children of the Body of my Sister, *Sarah Ann Scott*, Wife of *Thomas Scott*, of *Bircham* in the County of *Norfolk*, Clerk, lawfully begotten, and their Heirs for ever; and in case the said Children of my said Sister should all die before they respectively attain the age of twenty-one years, to the use and behoof of all and every the Children of *Edward Crockley*, of *Linton*, in the County of *Cambridge*; and upon this further Trust, that the said *William Tooke Harwood*, and the said *William Dalrymple*, or the Survivor of them, and his Executors or Administrators, shall receive the Rents, Issues and Profits of all and every my Freehold and Copyhold Premises from and after my Decease, and place the same at Interest upon good and sufficient Securities, in such a manner as he or they shall think proper, to and for the use of my said Sister's Children, until they shall attain the age of twenty-one years, and to divide the same equally amongst my said Sister's

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Children, share and share alike, paying to each his or her Share when he or she shall attain the age of twenty-one years ; and in case all the Children of my said Sister shall die before they respectively attain the age of twenty-one years, that then they the said Trustees, or the Survivor of them, or his Executors or Administrators, shall divide the last-mentioned Rents, Issues and Profits equally amongst the Children of the said *Edward Crockley*, share and share alike. All the rest, residue and remainder of my Personal Estate, of what nature or kind soever, not hereinbefore given or bequeathed, after the payment of my Funeral Expences, just Debts and Legacies, I give and bequeath unto the said *William Tooke Harwood* and *William Dalrymple*, to hold to the said *William Tooke Harwood* and *William Dalrymple*, their Executors or Administrators upon this special Trust and Confidence, nevertheless, that is to say, that they my said Trustees, or the Survivor of them, or the Executors or Administrators of such Survivor, do and shall from and after my Decease receive the Interest, Dividends, Rents, Issues and Profits thereof from time to time as the same shall become payable, and place the same on Security at Interest, until my said Sister's Children shall have respectively attained the age of twenty-one years ; and upon this further Trust, to divide the whole of the said rest, residue and remainder of my said Personal Estate, together with the accumulated Interest, Dividends, Rents, Issues and Profits, unto and amongst my said Sister's Children, equally, share and share alike, and to pay the said Children their Shares thereof when and as they should respectively attain twenty-one years ; and if any of my said Sister's Children shall happen to die before he, she, or they, shall have attained the age of twenty-one years, then the part of him, her or them, so dying, to be

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divided amongst the Survivors and Survivor of them, part and share alike; and in case all my said Sister's Children shall die before they attain the age of twenty-one years, then in Trust to pay, assign, transfer and convey the said rest, residue and remainder of my Personal Estate, and the accumulated Interest, Dividends and Produce thereof, to the Children of the said *Edward Crockley*, equal Shares thereof, whensoever they the said Children of the said *Edward Crockley* shall respectively attain the age of twenty-one years. And my will and meaning is, that if any of the Children of the said *Edward Crockley* shall happen to die before he, she or they shall have attained the age of twenty-one years, then the Part or Share of him her or them so dying to go and be divided to and amongst the Survivors and Survivor of them, part and share alike;" and the Testator thereby authorized and appointed his said Trustees, or the Survivor of them, or his Executors, Administrators or Assigns, to sell and dispose of any part of his said Freehold and Copyhold Estates, in order to pay his just Debts and Legacies, and other sums of Money therein specified.

The Testator's Sister had several Children born at the Testator's Death, and other Children, the Plaintiffs, born after the Testator's Death, and before the eldest Child attained twenty-one. The Question was, whether the latter Children took any benefit under the Devise?

Mr. *Bell*, and Mr. *Pemberton*, for the Plaintiff, contended that the Trustees took a Fee; and that according to *Ellison v. Airey* (a), no Child could take until the

(a) 2 Ves. 568.

eldest attained twenty-one, because, if all the Children died under that age, the Estate was to go over; and that Children born before the eldest attained twenty-one, took equally with those born at the Testator's Death. They cited also *Baldwin v. Carver* (b), and *Hughes v. Hughes* (c). It is very clear as to the Personal Estate, disposed of by the residuary Clause, that all the Children born before the eldest attained twenty-one would take equally with those living at the Testator's Death. And the apparent intention of the Testator was, that the Real Estate should go in the same manner as his Personal Estate.

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Mr. Owen, *contra*, was stopped by the Court.

The VICE-CHANCELLOR:—

In this Case, it may be well conjectured that the Testator meant that the after-born Children of his Sister, who were to share in his residuary Personal Estate, were also to benefit by the devise of his real Estate; but the Question for the Court is, whether this Will contains an expressed intention to that effect? It may be doubtful here, whether the Trustees took the legal Fee, or whether they took only a seisin to uses, but it does not appear to me to be material to the interest of the Children, whether they take legally or equitably only. The devise to all and every the Children of his Sister, lawfully begotten, and their Heirs, is, according to the force of the expression, to take effect in possession at his Death; and unless it be plainly controlled by what follows, must be confined to Children living at his Death. It is only when the Gift to Children is not to take effect in possession at the Death, that it can open to let

(b) 1 Cowp. 309.

(c) 1 Bro. C. C. 386.



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in Children born after the Death and before the Possession. If all the said Children of the Sister die before twenty-one, then the Estate is given over; but this Gift over, construed by way of executory Devise, is perfectly consistent with the immediate Fee before given to the Children living at the Death, being in terms confined to the said Children who are to take the Fee. Then follows the direction, that the Trustees shall receive and accumulate the Rents until his said Sister's Children shall attain twenty-one, and by necessary inference this must be confined to the Children to whom the Estate is before given. The next Clause provides, that the Trustees shall divide the Rents, so accumulated, amongst the Children of the Sister who shall attain twenty-one; and if all such Children shall die under twenty-one, then the Rents are given over; and here again, by necessary inference, the Testator must be considered as speaking of the Children to whom the Estate is given. The whole of this Devise, therefore, being capable of a clear consistent construction in favour of the Children of the Sister living at the Testator's Death, I cannot, with any safety to Property, adopt, upon conjecture, a construction in favour of after-born Children, which, though it might be reconciled to some Clauses, would wholly militate against the clear force of other Expressions, Declare that the Devise is confined to the Children of the Sister living at the death of the Testator; and that only one of such Children living to attain twenty-one, he is entitled to the whole Rents and Profits which accumulated before that period (*d*).

(*d*) See *Singleton v. Singleton* S. C. 1 Cox, 68; and *Love-ton*, in note to 1 Bro. C. C. 542. *day v. Hopkins*, Ambl. 273.

GOWER v. GROSVENOR.

*[This Case having been so much observed upon in the preceding Case of Lord DEERHURST v. Duke of St. ALBANS, ante, page 232, &c. and in several other Cases, the Publication from a MS. Note, of another Report of that Case, more complete than the Report by BARNARDISTON, in which there is a chasm, will, probably, be acceptable to the Profession.]*

SIR *Richard Grosvenor*, by his Will, devised all his Real Estates to his next Brother *Thomas Grosvenor*, for Life, without impeachment of Waste, with Remainders to Trustees to preserve Contingent Remainders, with Remainder to the first Son of the said *Thomas*, and the Heirs Male of the Body of such first Son, with like Remainders to the other Sons in Tail Male; and, in default of Issue of my Brother *Thomas Grosvenor*, “ I give and devise all my Real Estate to my Brother *Robert Grosvenor*, for Life, with Remainders to Trustees to preserve Contingent Remainders, Remainder to his first and every other Son in Tail Male. And my will and mind is, that my Library of Books, Jewels, Plate and Furniture of my Houses in *A. B. and C.* shall go as Heir-looms, as far as they can by Law, to the Heir Male of my Family successively, as my Real Estate is hereby settled.”

Sir *Thomas Grosvenor*, the first Devisee, died without ever having any Issue, so that the Real Estate came to Sir *Robert*, and this Bill was brought by a Legatee of Sir *Thomas*, to have the Jewels, Plate, Books and Furniture made liable to the Legacy, as part of the Personal Estate of Sir *Thomas*.

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On the other hand, the Defendant, Sir *Robert Grosvenor*, insisted that he was entitled to those things by way of executory Devise, under the Will of Sir *Richard*.

*Lord Hardwicke, Chancellor :—*

The Question is, whether the Jewels, Plate, Books and Furniture of Sir *Richard Grosvenor*, are to be considered in the event that hath happened as part of the Personal Estate of Sir *Thomas Grosvenor*? And this is a very considerable Question, not only in respect of the different Determinations that have been upon Cases of executory Devises of Personal Chattels, but likewise in respect of the frequency of this Clause in Wills, Marriage Articles and Settlements, for the settling and securing Furniture, Plate, and things of this kind as Heir-looms; not indeed in the strict sense in which the Law considers Heir-looms, but as a design and purpose to preserve them in a Family as much as possible.

If a very strict construction should be put upon these words, and if where such things could not go exactly as the Real Estate is limited they should be considered as becoming Personal Estate, I doubt it would overturn abundance of Limitations and Settlements that have been made of such kind of Personal Chattels which are intended to be preserved as Monuments in a Family, to support the honour and dignity of it.

But be this as it will, the Rules of Law and Equity are to take place, which are founded on the reason of the thing and positive Determinations; but then the intention of the Testator is to be supported as far as it can be made consisting with those Determinations.

Nothing can be more clear than the intention of the Testator in this Case, nor nothing more contrary to that intention than what is contended for on the part of the Plaintiff.

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But in order to find out the Rules of Equity and the positive Determinations, I shall consider this Case in two lights.

First, as the Clause upon which the Question depends refers to the Limitations in the Will of the Real Estates; and supposing these Limitations had been repeated by express words, and applied to these Personal Chattels.

And, second, in the next place, I shall consider that Clause in another light, viz. whether it is not rather to be taken as a directory Clause to the Executors.

And I think so much will arise under this latter consideration as will prevent me from giving any Opinion, determining the first Question. But yet I shall give my present thoughts concerning the first Question, but not so as to preclude myself hereafter.

Sir *Richard Grosvenor* having plainly an intention to settle his Real Estate, which was very large, in his Family, and to limit, as far as the Law would allow him, the Personal Chattels in question, devises in the manner as hath been stated.

It is impossible, in common sense, to draw in all the Limitations of his Real Estate, by express words, to the disposition of these personal Chattels; as for

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example : that Clause of Trustees to preserve Contingent Remainders to take in them all the rest. And suppose that he had expressly limited these Personal Things to Sir *Thomas Grosvenor*, for Life ; and after his Decease to the First Son of his Body, lawfully begotten ; and the Heirs Males of the Body of such first Son ; and afterwards to his other Sons in Tail Male, in like manner ; and in default of such Issue, to his Brother, *Robert Grosvenor*, for Life. Now, it is insisted, that had the Limitation to Sir *Robert Grosvenor* been in this manner, it would have been void, though Sir *Thomas Grosvenor*, as in the present Case, never had a Son ; and that it is to be considered as good, or bad, according as it stood at the time of making the Will ; and that no event afterwards happening, can make it better or worse : and that by this Limitation Sir *Richard Grosvenor* hath attempted to limit these Personal Chattels in a manner the Law will not endure ; and that the Remainders to the Sons of Sir *Thomas* was contingent at the time of the Will, and the Contingency hath never happened ; yet it may be void, being a Remainder after an Estate Tail. It is true, nothing can be clearer than that where there is a Remainder of a Personal Estate limited to one, after what would be an Estate Tail, in a Real Estate, vested in another, that Remainder would be void. It is true, Cases of this kind have received different Determinations, and very different fates, since these executory Devises of Personal Chattels were first allowed ; and the latter Cases have gone a great deal farther than the first. But, however, it is still adhered to, that wherever there is a Remainder, plainly after an Estate Tail limited before, that Remainder is void, and the Person who was to have the Estate Tail will have the dispositions of the whole.

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But yet, I think, there is a great difference in the reason of the thing between such a Limitation in Tail vested, and a contingent one. Where such a Limitation in Tail is given to be vested immediately, the Party trusts to no event, he does not put it as a thing doubtful which way the event may happen, for if he gives it to *A.* for Life, and then to *B.* and the Heirs of his body, *B.* being in *esse*, and then to *C.*, he trusts to no Contingency for the performance and execution of his Will; and in that case, therefore, no event can make it better or worse; and though *B.* dies never so early, though within the compass of a life from the death of the Testator, or the making the Will, that will not vary the case, because it was bad in its creation, and there was no Contingency; he gave it upon certain facts, which, in point of Law, made the subsequent Limitation void.

But a man who gives such a thing upon a Contingency, gives it upon a supposition that the event may or may not fall out; as for example: every contingent Remainder, even of a Real Estate, depends upon the event whether it shall be good or void. As if an Estate is given to *A.*, Remainder to the first Son of *A.*, without any Trustees to preserve contingent Remainders; if *A.* die before he hath a Son born, the Remainder was void by the event, even though he should have had a posthumous Son before the Statute of William the Third, which hath settled that question. So if a man gives an Estate to *A.* Remainder to the right Heirs of *B.*, and *A.* dies before *B.* that would be void by the event, though if it had fallen out otherwise it would have been good, and therefore all these contingent Remainders depend upon the Event.

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I say this to explain what I first said, that there is a great difference between Estates given to vest immediately, and such as are given to vest only upon Contingency, for in the latter case it may be taken together with the Contingency, and it would be contradictory to the Will to say that the event falling out one way or the other would make no difference.

Suppose then the Testator had repeated the words he makes use of as to his Real Estate, when he gave the Personal Chattels in question, whereby in default of Issue Male of Sir *Thomas Grosvenor* it would be given to Sir *Robert*, what is the plain construction of these words, and what Contingencies do they take in? Plainly two; first, if my Brother, *Thomas Grosvenor*, die without ever having a Son, and secondly, if he hath a Son, and such Son die without Issue Male. And suppose the Will had been penned in such a manner, I should be glad to know whether any Lawyer would insist upon it that the first Contingency would not have been good; it is impossible to deny it, for if there are two Contingencies, and one good, and that falls out, the Devise over will be good though the other Contingency be bad, for the bad subsequent Contingency, where he makes two, could never have touched the Limitation over upon Trust.

This is what seems to me to be implied, which, if expressed, could not have been doubted.

This therefore is not making a Devise good or bad, as an event falls out which was not in the view of the Testator, but construing his Will according to the Contingencies which he hath either expressed or implied in his Will.

This is something like the Case of *Loddington v. Kime* (a), where there was a Fee upon a Fee, and the Court said it was a Fee Simple with a double aspect, good or bad as the Contingency fell out one way or the other.

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It is true indeed that the Cases which have been upon this Point are very various, and have received different Determinations, and it is certain that the old ones go a great way in denying this Doctrine, and that in latter Cases it hath been favoured. Indeed my last Predecessor, for whose Opinion I have a great deference, did express himself rather in favour of the old Determinations against the latter.

But I will consider the Cases particularly.

The first is Sir *William Backhurst's Case*, which is in *Pollerfen*, and is cited by Lord *Nottingham*, in the Duke of *Norfolk's Case* (b), in these Words, "If a Term be limited to a Man for Life, and after to his first, second, third and other Sons in Tail Male successively, and for default of such Issue, the Remainder over, though the Contingency never happen, yet that Remainder is void, though there was never a Son born to him, for that looks like a Perpetuity."

That is this Case, but is it to be bad because it looks like a Perpetuity, if it be not one?

The next Case is that of *Burgis v. Burgis*, cited by Lord *Nottingham* (c), in the same Opinion; a Term is limited to one for Life with contingent Remainder to

(a) 1 Salk. 224.

(b) 3 Ch. Ca. 29.

(c) 1 Mod. 114.



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his Sons in Tail, and if he should have no Son or Sons there Remainder to Daughters, though he hath no Son, yet, because it is foreign and distant to expect a Remainder after the death of a Son to be born without Issue, that having a prospect of a Perpetuity also was adjudged to be void.

Lord *Nottingham* was a great Master of Words, and in this Case he only varies the Words of the Reason given in the first, but he did not consider that there was a double Contingency in this Case, either expressed or implied—if there is no Son, or if there is a Son and such Son dies without Issue—and there seems to be no doubt but that if the Contingency happen that there is no Son, the Remainder over would be good.

And this is the reason of the Case of *Vachell v. Vachell*(d). *Thomas Vachell* devised the use of his Paintings and Prints, Books, &c. to his Wife for Life, and if she be with Child of a Son, then, after her Decease, to such Son; but if his Wife be not with Child of a Son, or if the same Son shall die without having Issue Male of his Body, then, after the death of his Wife and such Son, to *Thomas Vachell*; Lord Keeper *Bridgman* declared he had advised with the Judges, and, being assisted with Justice *Rainsford* and *Wild*, decreed, that as the Wife of the Devisor not being with Child of a Son, so that the Contingency upon which the Limitations over was made never happened, the Devise to *Thomas Vachell* was an absolute Devise and good in Law.

It is plain upon one of the Contingencies this was a void Limitation, for if there had been a Son it would

(d) 1 Chan. Cases, 130.

have vested in him and the Issue Male of his Body, but because there was another Contingency expressed, and it was put in the disjunctive, and there never was a Son, the Remainder over was held good.

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If in the present Case both Contingencies are implied, it is the same thing, void by the event, if Sir *Thomas Grosvenor* had a Son, and if none, then good.

There is another Case of *Higgins v. Dowler* (e); and I do agree it is very difficult to find out whether there was any judicial Determination upon the Point, or not; but it is not to be doubted but Lord *Cowper* did fling out that Opinion upon the argument of the Demurrer, that in regard there never was a Son, but only a Daughter, the Limitation over to the Daughter was good; for I have seen a manuscript Note of that Case not in print, which agrees with the others, and he mentioned, as I have stated, what the different Contingencies implied, and therefore so far it is an Opinion of Lord *Cowper*, but no judicial Determination of that Point.

But there is a much older Case which much favours this Opinion, that of *Wood v. Sanders* (f). The Trust of a long Term of Years limited to the Father for Sixty Years, if he so long live, then to *John* and his Executors if he survived his Father and Mother; and if he dies in their Life-time, having Issue, then to his Issue; but if he dies without Issue, leaving the Father and Mother, then the Remainder to *Edward* in Tail. *John* did die, without Issue, in the Life-time of his Father and Mother.

(e) 2 P. Wms. 626.

mentioned in the Duke of

(f) Pollexfen, 35; and *Norfolk's Case*, 35.

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*Bridgman*, Lord Keeper, assisted by *Twisden* and *Rainsford*, resolved that the Remainder over to *Edward* was good, for the whole Term had vested in *John* if he had survived, yet the Contingency never happening, and so wearing out within the compass of Lives in being, the Remainder over to *Edward* might well be limited upon it. This is put merely upon the Contingency never happening, for if it had happened, there can be no doubt but the Limitation over would not have been good. So in the present Case, had Sir *Thomas Grosvenor* had a Son, the whole would have vested in him.

I think this Case of *Wood v. Sanders* greatly supports the Opinion of Lord *Cowper* above mentioned; and as to the subsequent Cases, it is rightly said, they have varyings.

The Case of *Stanly v. Leigh* (g), is admitted to be an Authority in point for the Defendant; but then that is impeached by the Case of *Clare v. Clare* (h), before Lord *Talbot*; and then comes the subsequent Case of *Saberton v. Saberton* (i), which seems to me very strong in the present Case; indeed there are the words, “in case any other of them have any lawful Issue.” What the Judges went upon in that Case I cannot well tell, as it is not usual to give Reasons in their Certificate; but I think much weight cannot be laid upon those Words, though, it is true, there was in the Case of *North v. Chapman* (k); but in that Case there was no express Limitation to the Issue Male, but only to the Plaintiff for Life, and the Estate Tail of the Real Estate arose by implication. And it was argued by Lord *Macclesfield*, that if in the

(g) 2 P. Wms. 618. S. C. MS.

(h) Forr. 21.

(i) Ibid. 245.

(k) 1 P. Wms. 663.

Real Estate, you imply an Estate Tail, merely in compliance with the intention of the Testator, and add the words, "to the Heirs of his Body before the other," it would be very hard to raise the same Implication to destroy his Intention as to the Personalty.

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But in the Case of *Saberton v. Saberton*, there was an express Limitation to all the Issue Male of the Tenant for Life, and therefore there could be no foundation to confine the words to their leaving Issue at the time of their Death.

These are the reasons which make my opinion incline to the Cases, that where such a Contingency does not happen, the Limitation over is good; but there is no occasion for me in this Case to give such an opinion as may conclude myself in so litigated a point, because here are added the words "as far as by Law they can," which I think are very material words, and exclude all the objections that were made in the Case of *Backhurst*, and that of *Burgis v. Burgis*, for it is impossible to object here that the Testator had any intention contrary to the rules of Law, for he hath by these words delivered himself from any imputation of that kind; and I take these words to be but the same in point of construction as if he had said "as much as by the rules of Law and Equity they can;" for when a man uses these expressions in a Will, the rules of Equity being the Law of this Court, the true construction of these words are as much as, by the Common Law of the Land, or the rules of this Court, which is in many cases the Law with regard to Property to a Court; and therefore I think it is not to be taken as if he had repeated the words used concerning the Real Estate all over again as to the Personal, but only as far as the Law would permit them to go. Then

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how far would that permit them to go? He might certainly have given these things to Sir *Thomas Grosvenor* for Life, and to the first Son and the Heirs of his Body, and if he dies without Issue before Twenty-one then Remainder over; and every body knows the common way of settling Terms for years is to settle the whole Term in Trustees in Trust, to permit the Husband and Wife to take the Profits for so many years of the Term as they shall live, and afterwards to permit the first Son of the Marriage to receive the Profits till he attain the age of Twenty-one years, and if he lives to attain Twenty-one, then the Trustees to assign over the whole Term to him, but if he dies before Twenty-one, then in Trust to permit the second Son.

The Case of *Stevens v. Stevens* was not the first Case wherein it was held that an executory Devise for an Infancy beyond the compass of a Life, was good; it is indeed the first wherein it was directly determined in the case of a Freehold, though the Case of *Taylor v. Biddall* (1), is a strong authority that way; but what the Judges went upon was, it had been allowed in Cases of terms for Years, and so it is mentioned in their Certificate.

As Sir *Richard Grosvenor* hath referred himself to the Rules of Law, I think the Limitations ought to go as far as those Rules will permit; and that is, to Sir *Thomas*, and afterwards to his Son, if he have any, but now he hath none, to Sir *Robert*.

The latter point made goes a great way to aid the Determination, which is, that this is to be taken as a

(1) 2 Mod. 289.

directory Clause to his Executors ; and I am inclined to consider all Clauses of this kind, in any ways referring to the rules of Law, in this manner.

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There are no express words of Devise, but it is only said, “ my will and mind is, that my Library, &c. shall go,” &c. ; and when it is afterwards said, “ as far as by Law they can,” it would be a very hard construction to call this an express Gift or Legacy to the Party, on purpose to defeat the intention of the Testator. Indeed, all personal things first vest in the Executors ; and I understand this Limitation to Sir *Thomas* to be according to *Manning* and *Lampet’s* Case, and all the Cases, a Gift only for his Life ; and though Sir *Thomas* enjoyed them for that time, yet the intention of the Testator was to have them go in succession, and I think here is nothing done which is to be considered a general Assent in the Executors to defeat or divest the Property out of himself, but I rather think the Property may still be considered as remaining in the Executors.

It is the most reasonable, natural, and satisfactory construction to understand this Clause, where no express Gift is made, as a directory Clause to the Executors ; it would otherwise be of pernicious consequence, as there are Clauses of this kind, not only in Devises, but likewise in Marriage Settlements of Chattels Real ; and if a man settles his Leasehold Lands (which often lie intermixed with his Freehold) to go with his Freehold, as far as by the rules of Law they can, it would be very hard to say, notwithstanding, they should be considered as Personal Estate. When a man makes use of words of this kind, he does not make the Limitation himself, but he leaves it to the Law to do it

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GROSVENOR. for him. And, therefore, this is something like Serjeant *Maynard's* Case, where he wrote in the Margin of his Will, “*Valeat quantum valere potest*,” and the *Lord Chancellor* inserted, “Trustees to preserve Contingent Remainders,” though none in the Will, because the Testator appeared to have an intention that it should go as far as the Law would permit.

Therefore, upon the whole, I am of opinion, that these Chattels, Jewels, Plate, Furniture, and Library of Books, are to go in the manner I have already mentioned, and are not to be considered as part of the Personal Estate of Sir *Thomas Grosvenor*.

But I desire to repeat it again, that I would not be understood to have given any conclusive Opinion binding myself upon the first general Question.

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END OF PART II.

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# C A S E S

BEFORE THE

## VICE-CHANCELLOR.

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HURST and another v. BEACH and others.

1819.  
3d, 4th, 11th  
and 25th Nov.  
1821.  
15th Jan.

**A** MORTGAGE, dated the 18th October 1813, by way of Demise for one thousand years, was made by the Defendant, *Beach* to *B. Heath* to secure 1,000 *l.* and the same was further secured by the Bond of *Beach*. *Beach* was Bailiff to, and a distant Relation of, *B. Heath*, a Lady much advanced in years. In the Answer of *Beach* it was stated, that a few days before her Death, and one day previous to the Codicil, after mentioned, *B. Heath* called for the Title Deeds and the Mortgage, and, alluding to some former Conversation respecting the Title Deeds, said, "I'll make you safe; I'll give them up to you now;" and she then gave *Beach* instructions where to find the Deeds; and, upon his bringing them to her, the Testatrix gave the Deeds back to him, and told him, "to take them, and to take care of them;—that if she got well she was to have them back again, but that if she died he was to have them for his own

*A delivery up of Mortgage Deeds does not cancel the Debt; but the delivery up of such Deeds and of a Bond, given at the time of the Mortgage, for the purpose of releasing or acquitting the Debt, in case the Donor should not recover from the Illness with which she was then afflicted, is, it seems, an affectual Donation mortis causâ.*

*The Doctrine as to accumulative Legacies, and as to the admissibility Evidence in such Cases.*



1819.

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use." On the following day, she reminded *Beach* of what had passed, and advised him to keep the Deeds safe.

By the Will of *B. Heath*, dated the 2d January 1812, several Legacies were given, and the Will proceeded thus ; " I also give and bequeath to *John Beach*, (meaning the said *John Beach*) now living with me, the Sum of 300*l.*, all which said Legacies I direct and desire may be paid immediately after my Decease, and bear legal Interest from my Death till paid."

By a *Codicil* to her Will, dated the 11th day of February 1814, the Testatrix, after giving several Legacies of 500*l.* each, gave " to my Man Servant, *John Beach*, a like Legacy or Sum of 500*l.*" The Testatrix then gave a like Sum of 500*l.* to her Maid Servant ; and all these Legacies she directed to be paid at the end of six months after her Decease.

The Testatrix died on the 15th February 1814. The Bill was filed by the Executors, and prayed that the Defendant might be decreed to deliver up the Mortgage of the 18th October 1813, and all Deeds, &c. in his Possession, relating to the mortgaged Premises ; and that the Legacy of 500*l.* bequeathed by the *Codicil* to *Beach*, might be declared to be given in lieu and satisfaction of the Legacy of 300*l.* left by the Will.

The first Question was, whether the delivery of the Mortgage and Bond, and the Title Deeds, operated as a Legacy *mortis causâ*, or as a release of the Mortgage Debt ? The next Question was, whether the Legacy by the *Codicil* was accumulative, or substitutional ? and, lastly, whether Evidence was admissible to prove that

the Testatrix did not mean that the Defendant should take both Legacies?

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Much Evidence was entered into as to the circumstances attending the delivering up of the Deeds, and the Expressions then used, and as to the intention with which the Legacy by the Codicil was given. A Witness on behalf of the Plaintiffs was one of the Executors. His Evidence was objected to as being interested in increasing the Assets; and the *Vice-Chancellor* said, that as an Executor it was his interest to increase the Assets, for it was an office of Expense to which the Assets were applicable; and that it must be considered as a rule, that an Executor cannot be examined as a Witness to increase the Assets. It was also objected, that Evidence could not be received to show that the Legacy, given by the Codicil, was meant to be substitutional. That Evidence was only received *de bene esse*.

*Executor cannot  
be examined as a  
Witness to in-  
crease the Assets.*

Mr. *Horne*, and Mr. *Spranger*, for the Plaintiffs:—

The first Question is, whether the delivering up of the Mortgage and the Bond is good as a *Donatio mortis causâ*?

*Beach* was a Servant to the Testatrix at low, annual, Wages. The Legacy to him in the Will and the Codicil describes him as a “Servant.” The Mortgage was in 1813. A Mortgage cannot be the subject of a *Donatio mortis causâ*. A delivery of that which constitutes the Debt, a Bond, for instance, as in *Gardner v. Parker* (a), may so be given, but not a Mortgage: the Mortgage Deeds do not constitute the Debt, but only a Security

(a) *Ante*, vol. 3, p. 184.

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for it. Besides, it would be in the teeth of the Statute of Frauds, which requires the Assignment to be in writing (*b*). The Bill, nor the Answer, does not state that the Bond given with the Mortgage was delivered to *Beach* with the Mortgage Deeds. The Evidence, to say the least of it, renders it very doubtful with what view the Mortgage Deeds were delivered to *Beach*, whether as intending a Gift in case the Testatrix did not recover, or to prevent her personal Representatives suing immediately on her Death for the Mortgage Money. After the supposed Gift, the Codicil was made; and it affords a strong inference that a gift of the Mortgage was not intended, as no mention of it is made in the Codicil; and she gives him a further Bounty by such Codicil. The Evidence is so strong, that the Court will not, without directing an Issue, say, that a Donation *mortis causâ* was intended.

Then as to the Legacies. The 500*l.* Legacy by the Codicil must be taken, not as additional, but as substitutional. The Evidence we contend is admissible, and if so, it clearly proves that the 500*l.* given by the Codicil was intended in lieu of the 300*l.* given by the Will. In *Osborne v. the Duke of Leeds* (*c*), the Master of the Rolls doubted whether such Evidence was admissible; the Case did not require a Decision on that point; but His Honor admits, that in *Coote v. Boyd* (*d*), Lord *Thurlow* considered such Evidence as admissible on either side.

Mr. *Bell*, and Mr. *Pepys*, for the Defendant *Beach*:—

There are two Questions: 1st. As to the Mortgage; 2d. As to the Legacies.

(*b*) See *Hassel v. Tint*,  
Ambl. 319.

(*c*) 5 Ves. 369.  
(*d*) 3 Bro. C. C. 521.

1st. Are we bound to deliver up these Mortgage Deeds ? *Beach* was the Agent of the Testatrix, and a Relation. It appears from the Evidence, that she being a Widow, and without any Family, intended to advance him in the World, and with that view she gave him back the Mortgage he had granted to her. But the mere delivering up of the Mortgage Deeds was not sufficient, and therefore with them she gave up the Bond. Though she could not thus by parol transfer her interest in the Land, she might give up the Money due on the Mortgage. When she gave up the Bond she gave up the Debt, for the Bond constituted the Debt, and the Mortgage was only the Security for such Debt. It operated as a release of the Demand in case she died.

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The VICE-CHANCELLOR :—

The facts which are to raise this question, as to the *donatio mortis causâ*, are left in much doubt. One of the Witnesses, according to the Evidence, speaks differently at different times. It is probable that the Bond was delivered up with the Mortgage Deed. There must be an Issue to try whether the Mortgage and Bond were delivered up by the Testatrix to the Defendant *Beach*, for the purpose of releasing or acquitting the Debt due from him in case she did not recover from the Illness with which she was then afflicted.

*Counsel for Defendant*—continued.

With respect to the Legacies, we say *Beach* is entitled both to the Legacy by the Will, and that by the Codicil. The latter is an accumulative Legacy.

A Bill was filed in the *Court of Exchequer* by one of the Legatees under this Will, and there, the Legacy to *Beach* was held to be accumulative. Evidence is inad-

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missible to show that the Legacy by the Codicil was intended in lieu of that given by the Will.

The VICE-CHANCELLOR :—

What is the rule of the Ecclesiastical Court in these cases ? On a question as to a Legacy, I should think it right to follow the Rules by which they are guided in the reception of Evidence. In general, they resort to the Rule of the Civil Law, but not in all cases. If this Case would bear the Expense, I should have wished to hear it argued by some Civilians. Let a Case be stated for the opinion of two Civilians. If the Case is not determined by decision in the Ecclesiastical Court, I must determine it by the principles of this Court. I have a strong opinion against the admissibility of the Evidence.

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A Case was accordingly stated for the opinions of Dr. *Swabey* and Dr. *Lashington*.

After stating the Will and Codicil the following Questions were submitted :—

*Questions.*

1st. Whether, upon a Question in the Ecclesiastical Court, as to whether the Legatee is entitled to the Legacy given by the Will and also by the Codicil, any declarations of the Testatrix of her intention that the Legacy given by the Codicil should be in substitution for the Legacy given by the Will, could, according to the practice of the Ecclesiastical Court, be received, and whether such practice is warranted by any Decision of that Court (c) ?

2d. Whether, in Questions as to the admissibility

(c) See *Coote v. Coote*, 1 Bro. 448.

of Evidence to explain a Testator's intention as to whether Legacies given by a Will and Codicil should be accumulative, or the one taken in substitution for the other, the Ecclesiastical Court adopts, or is regulated by, the principles of the Civil Law?

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*Answer.*

1st, and 2d. It is very rarely that any Suit is now brought in the Ecclesiastical Courts for the recovery of a Legacy, and we are not aware that the point submitted to our consideration has ever received any decision in those Courts, nor, indeed, been the subject of discussion. In all Questions upon the admissibility of Evidence to explain whether a Testator intended Legacies given by both Will and Codicil to be accumulative or not, we are of opinion that the Judges of the Ecclesiastical Courts would conform themselves to the Rules established by the Courts of Equity; but, in doubtful points, where the admissibility of any peculiar species of Evidence had either not been discussed in the Courts of Equity or left undecided by them, we think the Rules of the Civil Law would govern. Where Legacies are given by Will and Codicil, the Civil Law presumes them to be accumulative, but, according to that Law, this presumption might be rebutted by Evidence produced on the part of the Heir.—Neither the Text Authorities, nor the Commentators, define what species of Evidence would be admissible for such a purpose; nor do we believe that the nice distinctions upon the admission of parol Evidence to explain written Instruments were adopted in that Law: we think that if such a Case should arise in the Ecclesiastical Court, the course pursued would be to inquire, whether the Courts of Equity had any decided Rule on the point, and, on finding that they had not, then, as the Civil Law has neither directly

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nor indirectly excluded that species of Evidence, in our judgment the Ecclesiastical Courts would admit the declarations of the Testator as to his Intention.

Doctors Commons,  
Nov. 23, 1819.

*M. Swabey.*  
*Stephen Lushington.*

25th Nov.

The Questions and the Answer being read, the Vice-Chancellor said he would look into the Decisions.

1821.

15th. Jan.

The VICE-CHANCELLOR:—

In Cases of this class considerable confusion has been introduced from the inaccuracy of Reporters. The material Errors in *Atkyn's* Report (*f*) of the leading case of *The Duke of St. Albans v. Beauclerk*, are pointed out by Lord *Bathurst* in his Judgment in *Hookey v. Hatton* (*g*); and no person can read Lord *Thurlow's* reported Judgment upon this subject, without observing, that he is often made to contradict himself. I think the true result of the Decisions, as they apply to the present point, is to be stated thus:—Where a Testator leaves two testamentary Instruments, and in both has given a Legacy *simpliciter* to the same Person, the Court, considering that he who has twice given, must, *prima facie*, be intended to mean two Gifts, awards to the Legatee both Legacies; and it is indifferent whether the second Legacy is of the same amount, or less, or larger, than the first. But if in such two Instruments the Legacies are not given *simpliciter*, but the motive of the Gift is expressed, and in both Instruments the same motive is expressed, and the same Sum is given, the Court considers these two coincidences as raising a

(*f*) 2 Atk. 636.

*Ridges v. Morrison*, 1 Bro. C.C.

(*g*) Stated in a Note to 389; and S. C. 2 Dick. 491.

presumption that the Testator did not by the second Instrument mean a second Gift, but meant only a repetition of the former Gift.

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and others.

The Court raises this presumption only where the double coincidence occurs, of the same motive, and the same Sum, in both Instruments. It will not raise it, if in either Instrument there be no motive, or a different motive, expressed, although the Sums be the same; nor will it raise it, if the same motive be expressed in both Instruments, and the Sums be different. The presumption cannot therefore be raised in this case, although it be admitted that the motives are the same, inasmuch as the Sums are different, and upon the face of these Instruments the Defendant is entitled to both Sums.

This reasoning has no application to Cases where the second Instrument affords intrinsic evidence that it was intended by the Testator in substitution of the first Instrument, as in the cases of the *Duke of St. Albans v. Beauclerk*, *Coot v. Boyd* (h), and the late case of *Attorney General v. Harley*, before me (i).

Upon the Question, whether evidence is admissible to prove that the Testatrix did not mean that the Defendant should take both Sums, there are no Decisions in Courts of Equity. There are *obiter dicta* for the admission of such Testimony; but in the *Duke of Leeds v. Osborne* the point was fully argued, and Lord *Alvanley* appears to have inclined against receiving it. It did not, however, become necessary there, to decide the Question.

(h) 2 Bro. C. C. 521.

(i) *Ante*, 4 vol. 263.



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v.  
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and others.

It is to be collected from the *Digest* that it was admitted by the Civil Law.

This Court has no original jurisdiction in testamentary matters; it acts with respect to them only upon the ground of administering a Trust; and is bound to adopt, in questions of Legacy, the Principles and Rules of the Ecclesiastical Court. I found it necessary, therefore, to direct inquiry to be made in that Court upon this point, and the Answer that I have received is, that no Decision has taken place there upon this Question, and that no settled Opinion is formed upon it.

It remains then to be considered upon the principles of Evidence which are received in our own Law.

Our primary Principle, is, that Evidence is not admissible to contradict a written Instrument. In some cases, Courts of Equity raise a presumption against the apparent intention of a testamentary Instrument, and there they will receive Evidence to repel that presumption; for the effect of such Testimony is not to show that the Testator did not mean what he has said, but, on the contrary, to prove that he did mean what he has expressed.

Thus, where the Court raises the presumption against the intention of a double Gift, by reason that the Sums and the motive are the same in both Instruments, it will receive Evidence that the Testator actually intended the double Gift he has expressed. In like manner, Evidence is received to repel the presumption raised against an Executor's title to the residue, from the circumstance of a Legacy given to him; and to repel the presumption that a portion is satisfied by a Legacy.

In all these cases the Evidence is received in support of the apparent effect of the Instrument, and not against it.

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Here the Evidence tendered is not in support of the apparent effect of the Instrument, but directly against it. This Codicil leaves unrevoked the former Legacy of 300*l.* to the Defendant, and makes to him a further substantive Gift of 500*l.* The Evidence tendered is, that the Testatrix did not mean this as a further gift of 500*l.* but meant to substitute the 500*l.* in the place of the former 300*l.*

I am of opinion, therefore, that such Evidence cannot be received without breaking in upon the primary rule, that parol Evidence is not admissible against the expressed effect of a written Instrument.



The Minutes of the Decree were thus :

“ Declare that the Defendant, *John Beach*, is entitled as well to the Legacy of 300*l.* given to him by the Will of *Betty Heath* the Testatrix, in the Pleadings named, as to the Legacy of 500*l.* given to him by the Codicil to the said Testatrix’s said Will; and the Plaintiff *William Hurst*, and the Defendants *James Bourne* and *John Jackson*, the Executors of the said Testatrix, by their Counsel admitting Assets of the said Testatrix, sufficient to satisfy the said Legacies, refer it to the *Master* to compute Interest, after the rate of 4*l.* per cent. per annum, from the end of one year after the said Testatrix’s Death, on the said Legacies of 300*l.* and 500*l.* and to tax the said Defendant, *John Beach*, his Costs of so much of this Suit as relate to the said

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and another  
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two Legacies; and let the Plaintiff *William Hurst*, and the Defendants *James Bourne* and *John Jackson*, pay unto the said Defendant, *John Beach*, the said two Legacies of 300*l.* and 500*l.* together with what the Master shall compute for the Interest thereon, and tax the said Defendants said Costs as aforesaid; and let the Parties proceed to a Trial at Law at the next Assizes to be holden for the County of *Worcester*, on the following Issue, that is to say, 'Whether the Indenture of Mortgage and Bond in the Pleadings mentioned, dated respectively the 18th day of *November* 1813, and the several Deeds, Muniments and Writings in the Pleadings also mentioned, relating to the said Messuage or Dwelling House, Hereditaments and Premises, demised by the said Indenture of Mortgage, were delivered up by the said Testatrix, *Betty Heath*, to the Defendant *John Beach*, for the purpose of releasing or acquitting the Debt due from him in case she did not recover from the Illness with which she was then afflicted; and the said Defendant, *John Beach*, is to be Plaintiff at Law, and the Plaintiffs, *George Waldron* and *William Hurst*, are to be Defendants at Law; who are forthwith to name an Attorney, to accept a Declaration, appear and plead to Issue; and refer it to the *Master* to settle the Issue in case the Parties differ about the same; and in case any special circumstances shall arise upon the said Trial, the same are to be indorsed upon the *postea*; and let all Deeds and Writings in the custody or power of any of the Parties, relating to the matters in question, be produced before the said *Master* upon Oath; and let either side be at liberty to inspect the same, and take Copies thereof at their own Expense; and let such of them, as either side shall give notice to produce at the said Trial, be produced accordingly;

and reserve the consideration of all further Directions, and of the Costs of this Suit, until after the said Trial; and any of the Parties are to be at liberty to apply to this Court as there shall be occasion."

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and another  
v.  
BEACH  
and others.

*Note.* It does not appear at the Registrar's Office that the Decree was drawn up and passed. Probably, the Suit was afterwards compromised.

LORIMER v. LORIMER.

14th April,  
1820.

THIS was a Bill for a Partition, and for an Account of Rents and Profits received by the Defendant: and the Vice-Chancellor held, that if on such a Bill the Defendant appears to have received more than his share of the Rents and Profits of the Estate, the Court will direct an Account, and will not, in analogy to proceedings at Law for a Partition, confine its relief merely to a Partition; and the Decree was accordingly.

*On a Bill for a Partition, and an account of Rents received, a Decree for that purpose will be made, and the Relief will not be confined merely to a Partition.*

Mr. Bell, for the Plaintiff.

Mr. Belt, for the Defendant.

15th April,  
1820.

PRICHARD v. GEE.

*It is a Motion of course to examine de bene esse a Witness above 70 years old, and it may be made before appearance; and it is no exception that a reference of the Bill for impertinence is pending.*

THIS was a Motion to discharge an Order for the examination, *de bene esse*, of a Witness who was upwards of seventy years old, upon the ground, that there was a reference of the Bill for impertinence pending.

The *Vice-Chancellor* was of opinion, that although it was possible that a Witness under such circumstances might be examined to matter which was afterwards expunged, that this was a less evil than the delay, by which the Evidence might be wholly lost—and that the pending reference for impertinence formed, therefore, no objection.

22d April,  
1820.

Earl of NEWBURGH v. Countess Dowager of NEWBURGH.

*Parol Evidence is admissible to show that the Instrument is not the Will of the Testator as to a particular Estate, but is not admissible for the purpose of setting up the disappointed intention of the Testator.*

THE late Earl of *Newburgh* having Estates in the Counties of *Sussex*, *Gloucester*, and elsewhere, gave instructions to his Solicitor to prepare a Will, which *inter alia* was to give to his Wife, the Countess Dowager of *Newburgh*, an Estate for Life in his Estates in the Counties of *Sussex* and *Gloucester*. The Solicitor prepared a Will in writing accordingly, and the same was afterwards laid before an eminent Conveyancer to settle. By some accident, the word “*Gloucester*” was struck out by the Conveyancer, and the person who made the fair copy of the Will, changed the word “*Counties*” into “*County*,” and the Will, as fairly copied, omitted therefore altogether the Estate for Life to the Countess Dowager, in the County of *Gloucester*.

At the time Lord *Newburgh* executed the Will, the Solicitor who attended the execution had with him the Abstract of the Will as originally prepared, and the Will was not itself read, but this Abstract, which represented that a Life Estate was given to Lady *Newburgh*, as well in *Gloucester* as in *Sussex*; and Lord *Newburgh* executed the Will, believing that it followed the Abstract.

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Earl of  
NEWBURGH  
v.  
Countess  
Dowager of  
NEWBURGH.

The first Bill was filed for the execution of the Trusts of the Will as they actually appeared upon the face of the Will. The second Bill was by the Countess Dowager of *Newburgh*, stating the omission of her Life Estate in *Gloucester*, and praying, that the mistake in that respect might be rectified, and that the Trusts of the Will might be executed with such correction.

The first Question was, whether the Evidence on the part of the Countess Dowager of *Newburgh* could be received for the purpose of correcting the mistake?

The *Vice-Chancellor* refused the Evidence; because, admitting it to be clearly made out that the mistake existed, this Court had no authority to correct the Will according to the intention. The Will executed with that omission was certainly not the Will of the Devisor, and so it must be found by a Jury upon the facts stated as to the *Gloucester* Estate; but the Court could not for that reason set up the intention of the Testator, which, by mistake, he had been prevented from carrying into execution, as if he had actually executed that intention in the forms prescribed by the Statute of Frauds. To assume such a jurisdiction would, in effect, be to repeal the Statute of Frauds in

1820.

Earl of  
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v.  
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Dowager of  
NEWBURGH.

all cases where a Devisor failed to comply with the Statute by mistake or accident, and to operate this repeal, by admitting parol Evidence of the intention of the Devisor, which it was the very object of the Statute to avoid.—That this Case bore no analogy to cases where the Devisee or Heir prevented another Gift in the Will by undertaking to perform it. There, the Statute was in no manner broken in upon; but this Court, in respect of the Fraud attempted, fastened that Trust upon the Estate which in Equity and Conscience attached upon it.—That admitting that voluntary Conveyances might be corrected upon the principle, that as between Volunteers this Court would not permit a claim proceeding upon mistake, as to which two Cases were cited; yet this principle had no application to the case of Wills, for the difficulty was not that the Will was a voluntary Instrument, but that there could be no Will without the forms of the Statute of Frauds, and the disappointed intention had not those forms. That if any Party asked the same, he was ready to direct an Issue to try whether this was the Will of the Testator as to the *Gloucester* Estate, and upon this Issue the Evidence tendered would be admissible. No such Issue was asked; and the Case was sent, as to several questions of legal construction, to the Court of *King's Bench*.

The Heir here contended that the omission of Lady N.'s *Life* Estate had made the subsequent Limitations void as too remote; and it was immaterial to him, if he was right in this point, to try the fact of *devisavit vel non* as to the *Gloucester* Estate. If otherwise, he would have avoided the Will as to this Estate upon the fact; because a Gift immediate is not an

execution of the intention to give after a prior Life Estate, and the omission of the Life Estate of Lady N. must therefore have defeated the whole Devise as to the *Gloucester* Estate.

1820.

Earl of  
NEWBURGH  
v.

Countess  
Dowager of  
NEWBURGH.

I was not present at the argument of the foregoing points, but am informed that, as to this last point, Mr. *Bell* cited a Case, not in print, upon the authority of Lord Chief Baron *Richards*, in which it was considered that Lord *Eldon* had sent it to a Jury to try upon the same description of facts, what was the Will of the Testator; but whether any such Trial had ever taken place was not known.

Mr. *Sugden* cited *Towers v. Moor* (a), in which the same doctrine had been held, as to the Statute of Frauds, as was expressed by the *Vice-Chancellor*.

The Case was afterwards reheard before the *Vice-Chancellor*, and it was then suggested, as the result of the Conveyancer's Evidence, that there was no omission in the Will, but that the Error was owing to the introduction of a passage which he had first written, and afterwards struck through with a pen, but had been copied by mistake in the fair Will; and it was contended there ought, therefore, to be an Issue to try whether those words, so introduced by mistake, were part of the Will.

The *Vice-Chancellor* thought that if such a Case had been originally made, they would have been entitled to such an Issue; but that such Case being in direct opposition to the allegations upon the Record, he could not entertain it.

(a) 2 Vernon, 98.



26th April,  
1820.

## WOOD v. HARMAN.

*An Authority given by a Testator to his Trustee to lay out Money on Security, includes in it, an Authority to give sufficient Discharges to the Borrowers.*

THE Plaintiff, the Executor of *J. W.* lent a Sum of 600 *l.* part of the Assets of *J. W.* to the Defendant, upon Mortgage with a Power of Sale, and now filed his Bill for payment of the Money, or sale of the Premises.

The Defendant pleaded the Will of *J. W.* which authorized his Executors to convert all his Real and Personal Estate into Money, and lend the same upon good Security, upon Trust to pay the Interest to his Wife for Life, with Remainder over; and the Plea averred that the 600 *l.* lent was part of the Residuary Estate of *J. W.* and insisted that, by reason that the Testator had not given a Power and Authority to his Executors to discharge the Persons to whom they might lend Monies, the Plaintiff was not entitled to receive the 600 *l.* without the concurrence of the Persons beneficially interested.

I was not present at the Argument.

The *Vice-Chancellor* overruled the Plea, stating, that the Authority given by the Testator to lay out and invest the Money was an Authority to do all acts essential to that Trust, and necessarily, therefore, to give sufficient Discharges to the Borrowers of the Money.

*Original Bill.*

Marquis and Marchioness of ORMONDE  
v. KYNERSLEY.

*Bill of Revivor and Supplement.*

Marquis of ORMONDE v. KYNERSLEY  
and others.

29th April,  
1820.

THIS Bill was filed by the Remainder-man against the Executor of the deceased Tenant for Life, whose Estate had been unimpeachable of Waste, for an account of the produce of ornamental Timber, which had been cut by the Tenant for Life.

*Equitable Waste is a breach of Trust, and the Assets of a Testator are answerable for such breach of Trust.*

The Plaintiff early in 1808 had filed his Bill against the Tenant for Life himself for the same purposes, and had obtained an Injunction. The Tenant for Life put in his Answer to that Bill on the 1st June 1808, and by consent, an Order was made on the 31st July 1808, referring it to the *Master* to inquire as to the ornamental and other Timber which had been cut by the Tenant for Life.

This Order was never acted upon; and the Tenant for Life lived till April 1815, without any further proceeding being had in the Cause.

The present Bill was not supplemental to that Suit, but to a subsequent original Bill. The Case was much argued. I was not present at the Argument, but am informed, that it was, first, contended that such a Bill could not be filed, and the following Cases were cited; viz.

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Marquis of  
ORMONDE  
v.  
KYNERSLEY  
and others.

*Bishop of Winchester v. Knight (a). Garth v. Cotton (b). Hambly v. Trott (c). Lee v. Alston (d). Marquis of Lansdowne v. Marchioness Dowager of Lansdowne (e).* And secondly, that as no Timber had been cut since the Injunction in 1808, and the Plaintiff had not proceeded in the former Cause, he must be taken to have waved his claim in that respect.

Mr. Bell, Mr. Benyon and Sir G. Hampson for the Plaintiff.

Mr. Heald and ————— for the Defendants.

The *Vice-Chancellor* held, that though there was much ground for the latter defence, yet as it was not made by the Answer, he could not notice it. Upon the general point, whether such a Bill could be maintained, *His Honour* stated—That the restraint upon the legal Owner as to equitable Waste was to be considered as founded on a breach of that trust and confidence which the Devisor reposed in the Tenant for Life, that he would use his legal Estate only for the purpose of fair enjoyment.—That it was a Trust implied in Equity from the subsequent Limitations, and from the presumed intention of the Testator that he meant an equal benefit to all in succession.—That in all cases, the Assets of a Testator were answerable for a Profit made by breach of Trust: and an Account was decreed according to the Prayer of the Bill.

(a) 1 P. Wms. 406.

(b) 1 Dick. 183; S. C. 3 Atk.

751; and 1 Ves. 524. 546.

(c) Cowp. 376.

(d) 1 Bro. C. C. 194.

(e) *Ante*, 1 vol. p. 116.

SMITH v. DEATH.

1820.  
19th and 20th  
June.

**T**HIS was a Bill for the specific performance of a Contract of Sale. —The *Master* reported in favour of the Title, and the Case came on upon Exceptions to his Report. The Plaintiff's Title depended upon the Will of *Edward Wise*, who devised the Property in question to *Charles Brown* for Life, with Remainder to the use and behoof of such Child and Children of the Body of the said *Charles Brown*, and him surviving, who should be brought up and educated as a Member of the Established Church of *England*, and should be a constant frequenter or frequenters thereof, in such parts and proportions, &c. as he the said *Charles Brown* should by Deed or Will appoint; and in default of such appointment, to the use of the first Son of the Body of the said *Charles Brown*, lawfully begotten, who should be brought up and educated as aforesaid, and should be a constant frequenter of the said Church of *England*, and the Heirs of the Body of such Son, with divers Remainders over.

*The Court will not compel a Purchaser to take a Title depending upon matter of fact, if the fact do not admit of satisfactory proof, or be not well proved. A power of Appointment in a Grantee for Life, though in favour of particular objects, is extinguished by a Recovery.*

The first Son of *Charles Brown* attained his majority in 1817, and soon afterwards joined with his Father in suffering a Recovery, under which, the Plaintiff claimed.

Mr. *Sugden*, in support of the Exceptions.

Mr. *Shadwell*, contra.

It was first objected by Mr. *Sugden*, that the power of appointment being limited to surviving Children at the death of the Father, the immediate Gift to Chil-

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SMITH

v.

DEATH.

dren, in default of appointment, was to be construed with the same limitation.

The *Vice-Chancellor* held, that such a construction would be contrary to the force of the expressions used, and not warranted by necessary or rational inference.

Mr. *Sugden* next contended, that the description of the first Son “ who should be brought up and educated as a Member of the Established Church of *England*, and should be a constant frequenter of such Church,” was in its nature of uncertain proof, and was, in fact, inadequately proved before the *Master*; and he cited the Case of *Lowe v. Lush* (a), where Sir *W. Grant* held that an act of Bankruptcy being established, a Purchaser was not bound to take a Title depending upon Evidence that the Bankrupt was not so indebted at the time that a Commission could issue.

The *Vice-Chancellor* held, that it could not be insisted that a Purchaser was not bound to take a Title which, in some measure, depended upon matter of fact, for almost every Title must in some degree depend upon such matter. — That the matter of fact, upon which a Title depended, might be such as not in its nature to be capable of satisfactory proof, as in the Case of *Lowe v. Lush*, and such a Title a Purchaser could not be compelled to take: or, the fact might in its nature be capable of satisfactory proof, and yet not satisfactorily proved; and Courts of Equity, by assuming a jurisdiction to compel the specific performance of Agreements, necessarily forced upon themselves the difficulty of determining

(a) 14 Ves. 547.

such questions; and that in the present Case it did appear to him that the fact was capable of proof, and was satisfactorily proved.

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Mr. *Sugden* next contended that the Title was defective, by reason that the power given to *Charles Brown* to appoint to his Children, was not extinguished by the Recovery; and he argued, that if a general power to appoint for the benefit of the Owner could be extinguished by a Recovery, yet that a particular collateral Power, not being an interest in the appointor, or to be exercised for his benefit, but in the nature of a Trust to be executed for the benefit of others, could not be so extinguished; and he cited and distinguished the Case of *Edwards v. Slater* (b), that being the Case of a power to jointure, which might be used for the Party's benefit, and enable him to obtain a larger Portion with his Wife. He cited also *Doe v. Jesson* (c), since reversed in the House of Lords. The point, he observed, was not expressly decided in that Case, but that Lord *Redesdale* thought the Power could not be destroyed, as it was not to be exercised for the Party's own benefit. Mr. *Sugden* referred also to a Case of *West v. Burney*, before the *Vice-Chancellor* in January 1819 (d).

The *Vice-Chancellor* said, that in *West v. Burney* it appeared to him, as the result of the Authorities, that

(b) Hard. 410.

(c) 5 Maule & Selw. 95.

(d) According to my Note of that Case, which was very ably argued, by Mr. *Preston*, on the one side, and Mr. *Sugden* on the other, the point was not determined, nor did the

Case require the determination of it, and on that account it was not reported. In that Case Mr. *Sugden* contended that the Power was extinguished, and such is the conclusion in his work on Powers, p. 79, 80. Edit. 3.

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every Power reserved to a Grantee or Devisee for Life, though not appendant to his own Estate, as a leasing Power, but to take effect after the determination of his own Estate, and therefore in gross, might be extinguished.—That such a Grantee or Devisee could deal with the Estate in respect of his Freehold Interest; and his dealing with the Estate, so as to create interests inconsistent with the exercise of his Power, must extinguish his Power, upon the general principle that a Person is not permitted to defeat his own grant.—That it made no difference that here the Power was a particular Power in favour of Children; that *King v. Melling (c)*, was a particular Power in favour of the Wife; that such a Power could not be called a Trust, for the alleged *cestui que Trust* could not compel the execution of it, and being at the option of the Grantee for Life to exercise or not, any dealing with the Estate inconsistent with its exercise must determine his option.

Exceptions overruled.

(c) 1 Ventr. 225.

JUPP v. GEERING.

1820.  
2d and 7th Nov.

THE Defendant, *John Geering*, on the 17th January 1818, filed a Bill against *George Spencer Jupp* for the specific Performance of an Agreement. The Bill was answered, and on the hearing of the Cause, on the 25th November 1819, the *Vice-Chancellor* dismissed the Bill with Costs. Before the Taxation of the Costs *George Spencer Jupp* died, having by his Will appointed three Executors, who renounced. The Plaintiff obtained Letters of Administration, and filed the present Bill of Revivor against the Defendant, in order to obtain the Costs of the Bill dismissed. To this Bill the Defendant demurred generally, for want of equity.

On Demurrer, held, that if the Plaintiff dies before the Costs of a Bill dismissed are taxed, a Bill of Revivor by his Representatives for Costs cannot be sustained.

Mr. *Treslove* for the Demurrer:—

The Cases where a Bill of Revivor will lie for Costs are four; 1st. Where the Costs have been taxed, *Kite v. Hayward* (a), *Hall v. Smith* (b). 2dly. Where they are directed to be paid out of some particular Estate or Fund (c). 3dly. Where they are given as part of the relief, *Morgan v. Scudamore* (d); or, 4thly. Where the amount of the Costs has been settled by the *Master*, but the Report has not been signed (e). This Case does not fall within either of the excepted Cases. The Costs were not taxed before the death of the Defendant, and according to the Authorities (f) there can be

(a) Dick. 173.

(b) 1 Bro. C. C. 438.

(c) *Jenour v. Jenour*, 10 Ves. 572.

(d) 2 Ves. jun. 313; and 3 Ves. 195.

(e) See the Cases mentioned

in *Morgan v. Scudamore*, 3 Ves. 197.

(f) See the Authorities collected in Mr. *Beames's* able and useful Work on Pleas, 297, &c. and also in his recent Work on Costs, p. 195, etc.



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no Revivor for such Costs. I do not dispute the Decision in favour of the Revivor, in *Morgan v. Scudamore*, but only the reasoning on which the Decision is founded. The Costs there seem to have been given as part of the relief, and on that ground, and because the Costs had been taxed, though no Report was made, a Bill of Revivor was proper. The reason why Costs, when taxed, do not relate to a Decree in Equity, though they do to a Judgment at Law, is, because at Law, in Ejectment for instance, the Costs are taxed before final Judgment, and the Judgment mentions the amount of the Costs (g). In this Case, therefore, the general rule applies, that Costs not taxed are lost by the death of the Party.

Mr. Spence, *contra* :—

There is a distinction where a Person who is to receive, and one who is to pay, Costs, dies; if the former dies before they are taxed, a Bill of Revivor may be filed; but if the latter dies before they are taxed, no such Bill can be sustained. This appears to have been decided in *Morgan v. Scudamore* (h), and in *Price v. Humphreys*, mentioned in the Judgment. When *Morgan v. Scudamore* came on a second time (i), Lord Rosslyn said, “in the case of Costs at Law, if the Debtor in the Costs dies, they die with him; but if the Party to receive them dies, his Representative may have a *scire facias* (k);” and afterwards, when that Cause came on to be heard (l), and after much consideration, and a review of all the Cases in manuscript and in print, his opinion

(g) See the form of the Judgment, 3 vol. Black. Com. in the Appendix, p. xv.

(h) 2 Ves. jun. 316.

(i) 3 Ves. 197.

(k) 2 Ves. jun. 316.

(l) 3 Ves. 195.

was, that though the Plaintiff died before a Report as to Costs, his Representatives were entitled to a Bill of Revivor for such Costs.

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The VICE-CHANCELLOR—[after stating the Case]—Lord *Rosslyn* must have been mistaken by the Reporter, when he is made to say, in *Morgan v. Scudamore*, that there is at Law a difference as to Costs between the death of the Party who is to pay, and the Party who is to receive. There is in fact no such difference.

At Common Law, Costs were lost if either Party died before final Judgment; but by Statute of the 17 *Car.* 2, c. 8, if either Party die between the Verdict and the final Judgment, the final Judgment may still be entered up, and Costs and Damages recovered; and the 8 & 9 *Wm.* 3, c. 11, extends the remedy to Cases where either Party dies after interlocutory, and before final Judgment. The final Judgment at Law ascertains the amount of the Costs, and is necessarily, therefore, preceded by Taxation.

The Statutes to which I have referred have no application to Cases in Equity; and proceeding, therefore, upon the general analogies of the Common Law, I must hold, that Costs in Equity are lost by the death of either Party before Taxation, as Costs at Common Law were lost by the death of either Party before final Judgment.

Demurrer allowed (*m*).

(*m*) Costs, unless taxed before the Bankruptcy, cannot be proved under a Commission. *Ex parte Sneaps*, Cook. Bank-

rupt Law, 192; Montague's Bankrupt Law, 1 vol. 181; and see *Rex v. Davis*, 9 East, 320.

3d June, 1820.

KIRKLEY v. BURTON.

*It is good ground of Demurrer that the name of Counsel does not appear to the Bill.* THIS was a Demurrer to an amended Bill, for that the name of Counsel did not appear to the Bill.

Mr. Norton, *contra*, contended that advantage could not be taken of this omission by Demurrer, because by demurring the Defendant admits the Bill was duly filed, and if the Demurrer were allowed, the Bill would still remain in Court. In *French v. Dear (a)*, the Cause came on to be heard, and it appearing the Bill was not signed by Counsel, it was ordered to be taken off the file. The Defendant ought to move to take the Bill off the file. There is, he observed, no positive order that Counsel shall sign the Bill, but only the Draft.

Mr. Wilbraham, in support of the Demurrer, insisted that the objection for want of a Signature to the Bill, might be made either by Demurrer, or by a motion to have it taken off the file. It is necessary to be signed, as a Security against scandal; and he observed, that in cases of Interpleader, a Demurrer will lie if the usual Affidavit does not accompany the Bill.

The *Vice-Chancellor* held, that the objection appearing upon the Record, the Defendant might well allege by Demurrer that he was not bound to answer the Bill; and he likened it to the case of a Demurrer for want of an Affidavit to accompany a Bill of Interpleader, or a Bill to transfer the jurisdiction from Law to Equity upon the ground of a lost Instrument. The Demurrer must be allowed, but the Plaintiff to be at liberty to add in the Record the name of the Gentleman who signed the Bill.

(a) 5 Ves. 547. See Wyatt's P. R. 57.

SWINFORD v. HORNE.

10th June 1820.

**MR. Cooper** moved for leave to re-examine before the *Master* a Witness who had been examined before the hearing; and he cited *Vaughan v. Lloyd (a)*.

*Mr. Wetherell, contra.*

The *Vice-Chancellor* held that the *Master* may, without order, examine to different matters a Witness who had been examined before a Decree, but not to the same matters; and that the Court will not make such an Order, unless in cases of accident or surprise. (*b*),

*A Witness in the Cause cannot be re-examined before the Master to the same matter, without an Order, which will only be made in cases of accident or surprise.*

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MUNROE v. DOUGLAS

1820.  
June 13th and  
15th,  
and 1st and  
3d July.

**THE** late Dr. *Munroe* was born in *Scotland*, and educated there to the profession of a Surgeon; at the age of nineteen he went out to *Calcutta* to practise, and in 1771 was appointed Assistant Surgeon to a Regiment in the *East India Company's Service*. On the 6th May 1789 he was appointed full Surgeon in the Company's Service. In 1811 he was ranked as Surgeon in his Majesty's Service, but it was only local rank. He was married in *India* in 1797 to the Plaintiff. On the 15th March 1813 he made his Will, and added a Codicil

*An acquired Domicil is not lost by mere abandonment, but continues until a subsequent Domicil is acquired, which can only be animo et facto, unless the party die in itinere, toward an intended Domicil.*

(*a*) 1 Cox, 312.

(*b*) See 2 Swanst. 264.

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thereto on the 22d September 1814. He left *India* on the 2d January 1815, with a determination, as the Plaintiff contended from his Letters when in *India*, to spend the rest of his days in *Scotland*, and arrived in *England* on the 15th of the following June, where he took a House, and owing to ill-health became undetermined whether he should continue to reside in *England* or spend his days in *Scotland*. In July 1816 he went on a visit to *Scotland*, and died at Sir *Robert Rawley's* Seat, there, on the 8th August 1816. By his Will he had given Property to his Wife, the Plaintiff, to the amount of 1,000*l.* a year and upwards, and made Dispositions in favour of his Nephews and Nieces, but he had not disposed of the remainder of his Property, amounting to nearly 60,000*l.*; and the Question now was, whether Dr. *Munroe* was, at his Death, to be considered as domiciled in *Scotland*, or whether he was, as the Defendants contended, to be considered as domiciled in *England*, the distribution of the Property being by Law much more in favour of the Plaintiff in the former case than in the latter.

Many Letters were given in Evidence, written by the Doctor during his residence in *India*, to show that his determination was to spend his latter days in *Scotland*, and some passages in his Will were relied upon as indicative of that intention. Letters also and Conversations were in Evidence to prove that after the Doctor's return from *India*, his health was such that he became undetermined whether he should spend his days in *England* or *Scotland*; and clear Evidence was adduced, that when he went to *Scotland* after his return from *India*, it was only on a visit, and without an intention of then permanently residing there. The Evidence was very voluminous. The impression of it upon the

Counsel and the Court will appear in the Arguments and in the Judgment.

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Mr. *Wetherell*, Mr. *Heald*, and Mr. *Barber*, for the Plaintiff:—

The Widow of the late Dr. *Munroe* claims one-half of the Property of her late Husband, on the ground that at his Death his Domicil was in *Scotland*. There is not under all the circumstances of this Case any direct Decision in point, but the Authorities as far as they go appear to us in favour of the Plaintiff's Claim.

It is clear from Passages in the Will, that the Doctor intended finishing his days in *Scotland*. He there says, as to his undisposed Property, "I will not dispose of the remainder of my Property (meaning the 60,000*l.* undisposed of) till I come home, when it is my intention to cultivate a more intimate acquaintance with the junior Members of my Family, in order that I may divide my Property equally amongst them." At the time he made his Will he thought all the junior Members of his Family were resident in *Scotland*, and there it is he must be supposed as intending to cultivate the acquaintance he speaks of; *Scotland* he considered as his "home." Besides this, there are several Letters of his in which expressions are used showing his intention of returning to *Auld Reekie* (*a*), and making a permanent Residence in *Scotland*; the *animus redeundi et morandi*, is clear.

[All the Evidence on the part of the Plaintiffs was here read, as was also, by consent, the Evidence on the part of the Defendants.]

(*a*) A Scotch expression, meaning Edinburgh.

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*The Counsel for the Plaintiff*—continued.

The Plaintiff's Evidence, we contend, arising from the expressions in the Will, and the tenor of Letters we produce, shows an intention of returning to *Scotland*. Our parol Evidence shows that Dr. *Munroe* intended to go to *Scotland* and die there. The Evidence of the Defendants is somewhat contradictory, but it purports that he only meant to visit *Scotland*, not to continue there, and to winter in *London*. The weight of the Evidence, however, we insist, is in favour of an intention to die in *Scotland*.

The VICE-CHANCELLOR:—

It is clear from the Letters produced as exhibits, and other proof, that when Dr. *Munroe* went to *Scotland* it was merely for a visit, and that he intended to return to *England*: that cannot be doubted.

*Counsel for the Plaintiff*—continued.

Some of these Letters produced by the Defendant as exhibits were not known to us until they were just now read. They are certainly a very strong contradiction of our view of this part of the Case, and of our Evidence; and as *Your Honor* seems convinced on that part of the Case, it is unnecessary to enlarge more upon it; but supposing it was not his then intention permanently to reside in *Scotland*, and that he only meant a visit at that time, yet still we insist that it was his intention, at a future period, to return to *Scotland*, and permanently reside there, and that he never resigned such intention, and then the Question will be, whether, by reason of his original Domicil in *Scotland*, and his general intention of finally residing in *Scotland*

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and dying there, coupled with the fact of his actually dying there, there are not sufficient facts for the purpose of establishing his Domicil in *Scotland*? In other words, we contend, first, that he never lost his Scotch Domicil; or, secondly, that if he acquired a Domicil in *India*, he abdicated it, and resumed his original Scotch Domicil.

As to the first point, the case of *Bruce v. Bruce* (b), will probably be insisted upon by the Defendants, but that Case varies from the present. In this Case, the Testator died in *Scotland*; in that, he died in the *East Indies*. In this Case, Dr. *Munroe* was in the Service of His Majesty, and liable to be sent from one Country to another; in that Case, *Bruce* died in the Service of the East India Company, whose Employment imposed upon him the necessity of a local Residence: Being in the King's Service in *India* does not constitute a Domicil (c). The Death of *Bruce* in *India* was a strong circumstance on which Lord *Thurlow* very much relied (d). We do not say that merely dying in *Scotland* gave Dr. *Munroe* a Domicil there, but that it is a strong circumstance to evidence an intention to make *Scotland* his Domicil, and seems to have had an influence in the Decision of *Bruce's* Case. If a man goes to *India* for the purpose of permanently residing there, *animo morandi*, his Residence will con-

(b) In the House of Lords, 1790, 7 vol. Pal. Cases, 15th April 1790; 7 vol. Bro. Toml. Edit. S. C. 11 & 12 vols. P. C. 230, Edit. by Tomlyns. Dictionary of Decisions, page

(c) See what Lord *Thurlow* says in *Bruce v. Bruce*, Dom. Proc. 2 Bos. & Pull. 230. 4617. And see a note of what Lord *Thurlow* said in the decision of that Case, 2 Bos.

(d) Dom. Proc. 5th April & Pull. 230.



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stitute a new Domicil; but not so, if he does not intend a permanent Residence—if he go there *sine animo remanendi*, and only means to raise a fortune and return to his original home (e). But not to press this point further, it being supposed to be concluded by the decision in *Bruce's Case*, we shall proceed to the second point, 2dly, whether he did not lose his acquired Domicil in *India*, and resume his original Domicil in *Scotland*? By quitting *India* with a clear intention of never returning, he quitted his acquired Domicil there, and never after acquiring a Domicil, does not his original Domicil revive? Suppose he acquired a Domicil in that part of the *East Indies* which belongs to the *Dutch*, would not his return to this Country have been an abandonment of his *Dutch* Domicil? Suppose instead of returning to *England* he had gone to *France* with an ultimate intention of finally residing in *Scotland*, and that he had died in *France*, would he have carried his acquired Domicil with him into *France*? It must have been held in such case that he was *in transitu* to *Scotland*, and that *Scotland* was his Domicil. Admit that he went only on a visit to *Scotland*—still, as he intended ultimately to fix his abode there, and died on a visit, yet dying with a previous intention of ultimately settling in *Scotland*, he must be considered as *in transitu*, and his original Domicil must be considered as resumed. His death in *Scotland* was what he intended, though he did not foresee it would happen so soon, and while on a visit only to that Country.

In *Colville v. Lauder* (f), decided in *Scotland* on the

(e) See Vattell, liv. 1, c. 19, s. 218. Ersk. Inst. lib. 3, tit. 9, s. 4. To the same effect is the present French

Law. Code Civile, lib. 1, c. 3, tit. 3, s. 103, 106.

(f) Dictionary of Decisions, 33 & 34 vols. in Appendix, p. 9, tit. Succession.

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15th January 1800, the Case was thus:—“ In 1793 *David Lauder*, a native of *Scotland*, went to the Island of *St. Vincent*, under Indenture to follow his trade as a Carpenter, leaving his Wife *Jane Colville*, with her relations at *Leith*. He remained at *St. Vincent* till the 21st July 1797, when he wrote to his Father *William Lauder*: “ As I never loved the *West Indies*, and as “ my health is very much hurt by a long continuance “ in it, I have determined to go off to *America* in a ship “ that sails from this in a few days, hoping my health “ may be re-established by a change of climate. I “ have, during my stay in this part, made shift to lay “ up some money, 200 *l.* of which I have converted into “ a Bill of Exchange, which is sent you indorsed, re- “ serving to myself no more than will defray my neces- “ sary expenses to *New York*, where, if it please God “ that I arrive, you shall hear from me; but as a con- “ siderable time will be necessary before I can fix upon “ any plan of life, I will then be more explicit; only draw “ the money and secure it for me; for if I do not succeed to “ my wishes in *America* I will return to my native coun- “ try. I have wrote three different times to our friends “ at *Leith*, but have never been favoured with an answer. “ There must be some very grave and important reasons “ for so very extraordinary omission, but what they are “ I cannot conceive. However, be pleased to let them “ know that I have no desire to give them a fourth “ trouble. Dear father, it may so happen from the “ common accidents of life, that you may never hear “ from me again, the money is either at your or my dear “ mother’s disposal.”

“ He sailed to *New York* soon after, and remained here till Spring 1798, when he went to *Canada*, where

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he was drowned in the following September. It appeared from some jottings in his possession, that he meant to have returned to *Scotland* in a few months. His Widow claimed one half of his Funds, as *jus relictæ*.

“ In defence, his Father founded on the Letter above quoted, as excluding her right to any share of the 200*l*. remitted to him.

“ The Lord *Ordinary* repelled the defences.

“ The Defender in a Petition, pleaded: When a Scotsman lives for years abroad in prosecution of his Employment, he acquires a Domicil there, which must regulate his succession, though he may intend to return to *Scotland* at some future period. In this case, therefore, the law of *England* must prevail, according to which the Letter in question would be held as a Testament effectually excluding the claim of the Widow. *Blackstone*, vol. 2, p. 402. 434.

“ *The Widow answered*: In the whole circumstances of this case, the deceased cannot be considered abroad *animo remanendi*, or to have formed a Domicil elsewhere, and therefore the Law of his Nativity must govern. *Ersk. B. 3, T. 9, § 4*; so that it is unnecessary to investigate the effect of the Letter in question by the Law of *England*.

“ *Observed on the Bench*: When the deceased was in *St. Vincent* his succession would have been regulated by the Law of *England*; but after leaving that Island

he must, in the whole circumstances, be considered as *in transitu* to *Scotland*.

“ The Lords adhered.”

This is the whole of the Case, as reported in the *Dictionary of Decisions*.

The Carpenter in that case had acquired a Domicil in *St. Vincent's*, and if he had died there, that place would had been his Domicil, but he leaves *St. Vincent's*, sails for *America*, and is drowned ; he had renounced his acquired Domicil, and had gained no other ; and we see it was held that though he lost his *Scots* Domicil by acquiring another, yet that having abandoned his acquired Domicil, the original *Scots* Domicil reverted. This case is very strong in favour of the Plaintiff. It establishes as a principle of law, that if a man quits his acquired Domicil and does not get another, the *Domicilium originis* revives. There was an abandonment of the acquired Domicil, and a Letter written showing an intention to get a Domicil elsewhere, and actually residing in *New York* from 1797 to 1798, and no evidence of an intention finally to reside in *Scotland*, and yet that place, the *Domicilium originis* was held to be his Domicil. That Case was decided in 1800, subsequently to *Bruce v. Bruce*.

In *Macdonald v. Laing* (g), a native of *Scotland*, a military man, goes to *Jamaica*, returns back to *Scotland*, and dies there, and the Court held that the Scotch Domicil existed; though his purpose of going to *Scotland* must be considered only as a visit, as his Commission in his Majesty's Service continuing, he might have

(g) *Dictionary of Decisions*, 11 & 12 vols. p. 4627 ; tit. *Foreign*, 118.

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been ordered to *England* or elsewhere. Dr. *Munroe* was liable to no such orders. In that Case, which was not appealed from to the House of Lords, and has subsequently been cited as an authority, the Death in *Scotland* was considered as material. That Case was decided on the 27th November 1794, and is thus reported :—" *William Macdonald*, a native of *Scotland*, acquired a considerable Plantation in *Jamaica*, where he had resided about fifteen years. In 1779 he was appointed Lieutenant in the 79th Regiment of Foot, at that time quartered in the Island; he also got the Command of a Fort in it. In 1783 he obtained leave of absence for a year, that he might return to *Scotland* for the recovery of his health. He died a few months after his arrival. The 79th Regiment was by this time reduced. He had no effects in *Scotland*, and his only Property in *England* were two Bills, which he had transmitted from *Jamaica* before he left it, in order, as was said, to purchase various Articles for his Plantation.

" His Father intromitted with the Funds in *England*.

" *Jean Macdonald*, and other Sisters of the deceased, brought an Action against him to account for their brother's Executry.

" The Defendant died during the dependence of this Action, leaving his Grandson, *Alexander Laing*, his Heir, as to the succession of his Son. The rights of the Parties turned upon the question, whether *William Macdonald* had his Domicil in *Jamaica* or in *Scotland*? *Laing* offered to prove that the deceased meant to have returned to *Jamaica* if his health had permitted, and that he had no intention of residing in this Country;

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and pleaded, moveable succession is regulated by the law of the Country where the deceased resided *animo remanendi*. To which Country this description belongs is to be ascertained not merely by the place of his Birth, or of his Death, but by the whole circumstances in his situation. See Case of *Bruce v. Bruce*, No. 115, p. 4617. Upon this principle *William Macdonald* had his Domicil in *Jamaica*.

“ The *Lord Ordinary* found the succession was to be regulated by the law of *Scotland*, in respect that *William Macdonald* died in *Scotland* his native Country, where he had resided several months before his Death.

“ A re-claiming Petition having been presented, the Court were of opinion that the Domicil of *William Macdonald* was in *Scotland*, and that the proof offered was incompetent, and therefore unanimously “ refused ” the Petition without Answers.

“ A second re-claiming Petition, along with which were produced two Letters of the deceased, as showing his intention to return to *Jamaica* upon the recovery of his health, was appointed to be answered. Upon advising which some of the Judges came to be of opinion that the Domicil of the deceased was in *Jamaica*. A considerable majority, however, remained of their former sentiments.

“ The Court adhered.”

There is evidence that Dr. *Munroe* had the intention of finally settling in *Scotland*, and we say the execution of that purpose was intercepted by Death. It is true he died on a visit, and that he intended returning to

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*London*, but his final destination was *Scotland*. Suppose there was no Evidence of Dr. *Munroe's* intention where he would reside after he had left *India*, and he had died in *England*, it could not be contended that it was the same as if he had died before he left *India*, for according to that doctrine, if he had died in *France*, without any intention of a fixed residence there, he would have been domiciled in *France*. Suppose he had been a Merchant in *Spain*, and had resided there for a considerable time, and became domiciled, and that he afterwards gave up his Business and quitted *Spain* for ever, going to various places, and stopping only a short time, and no Evidence adduced where he meant finally to reside, and he dies; where would you say his Domicil was? His original Domicil would revert. Where the acquired Domicil is abandoned the *Domicilium originis* reverts. Dr. *Munroe's* residence in *India* only suspended his original Domicil, and nothing but his Death in *India* could have the effect of extinguishing the original Domicil, and completing the acquired Domicil. He afterwards abandoned his *Indian* Domicil, by leaving it never intending to return, and as he acquired no new Domicil, the original Domicil reverts. He abdicated his *Indian* Domicil the moment he embarked on Board of Ship for the purpose of quitting *India* never to return; and it cannot be held that though he left *India* in point of fact, he did not leave it in point of law. In a case of doubt as to the Domicil, wherever it is in equilibrium the original Domicil prevails. That is the effect of Lord *Thurlow's* Judgment in Sir *Charles Douglas's* Case (*h*). It must be pre-

(*h*) See this Judgment, stated in *Sommerville v. Sommerville*, 5 Ves. 758.

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sumed that when a man abandons his acquired Domicil he means to resume his native Domicil. There is but little to be found in the Civil Law respecting Domicil, nor could a question of this description arise at *Rome*, for there was no difference between the Domicil of a Person, whether born in a Province of the Roman Empire, or in the Capital; all were governed by one Law.

It is laid down as a general principle in the *Code* (i), "*Origine propria neminem posse voluntate sua eximi, manifestum est.*"

In another passage of the *Code* (k) it is said, "*Non tibi obest, si cum incola esses, aliquod munis suscepisti modo si antequam ad alios honores vocaveris, Domicilium transtulisti.*"

In another passage (l) it is said, "*Cives quidem origo, manumissio, allectio vel adoptio: incolas verò (sicut et Divus Hadrianus Edicto suo manifestissime declaverit) Domicilium facit. Et in eodem loco singulos habere Domicilium, non ambigitur, ubi quis larem, rerumque, ac fortunarum suarum summam constituit, unde (rursus) non sit discessurus, si nihil avocet: unde cum profectus est, peregrinari videtur: quod si rediit, peregrinari jam destitit.*"

If it be doubtful where a man's Domicil is, the Law presumes in favour of his original, natural, Domicil, which is connected with rights and duties, early affections and

(i) Cod. lib. 10, tit. 18, s. 4.      (l) Cod. lib. 10, tit. 39, s. 7;  
It is in p. 422 of the Elzevir      and see Dig. lib. 50, tit. 16,  
Edition.      s. 203.

(k) Lib. 10, tit. 39, s. 1.



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habitudes, to which it must be supposed he would be anxious to revert (m). In Voet (n) there is the following passage:—“*Interim inficias haud eundem, quin in dubio unusquisque Domicilium in ipso potius originis loco, quam alibi, præsumat habere: cum enim ab initio jus Domicilii à patre in filium translatum sit, atque ita filius secutus sit Domicilium habitationis paternæ, consequens est, ut is, qui id mutatum contendit, hoc ipsum probet; cum in eodem statu res unaquæque mansisse credatur, donec contrarium demonstratum fuerit.*” In another passage he says (o), “*Quoties autem non certo constat, ubi quis Domicilium constitutum habeat, et an animus sit inde non discedendi, ad conjecturas probabiles recurrendum, ex variis circumstantiis petitas, et si non omnes æque firmæ, aut singulæ solæ consideratæ non æque urgentes sint, sed multum in iis valeat judici, prudentis, et circumspecti arbitrium. Sic enim in dubio in loco originis et Domicilio paterno quemque præsumi continuasse Domicilium, jam ante dictum. Idemque est, si in aliquo loco majorem bonorum partem possideat; aut bonis divenditis, quæ alibi possidebat, in aliam urbem cum familiâ se contulerit, ibique assidue versatus fuerit: vel jus civitatis aliquo in loco sibi acquisiverit, atque ita illic habitet.*” Pothier says,—“*Il paroît quelques fois incertain où est le Domicile d’une personne; ce qui arrive, lorsqu’elle a un ménage dans deux lieux différens, où elle va passer alternativement différentes parties de l’année. Il n’y a pas lieu à cette incertitude, lorsque cet homme a un bénéfice ou*

(m) In *Ommaney v. Bingham*, Dom. Proc. 18 March 1796, the Lord Chancellor said, “Birth affords some argument and might turn the scale, if all the other circumstances

were in æquilibrio.” See 5 Ves. 758.

(n) Comm. ad Pand. Lib. 5, tit. 1, pl. 92, at the end.

(o) Lib. 5, tit. 1, pl. 97.

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*un charge, ou autre emploi non amovible qui demande residence dans l'un des lieux; car il n'est pas douteux en ce cas que c'est dans ce lieu où doit être fixé son Domicile. Lorsque cet homme n'a aucune bénéfice ni charge ou emploi, qui l'attache à l'un de ces deux lieux, on doit, pour fixer son Domicile, avoir recours à d'autres circonstances, et decider, 1° pour le lieu où il laisse sa femme et sa famille lorsqu'il va dans l'autre; 2° pour celui où il fait le plus long séjour; 3° pour celui où il se dit demeurant dans les actes; ou pour celui où il est imposé aux charges publiques; ou pour celui où il se rend avec sa famille pour faire ses Pâques. A défaut de toutes ces circonstances, on doit, in dubio, decider pour celui des deux qui étoit le Domicile de cet homme, ou de ses père et mère, avant qu'il ait commencé de tenir un ménage dans l'autre; car le changement de Domicile d'un lieu à un autre devant être justifié; on est toujours, in dubio, présumé avoir conservé le premier (p)."*

According to *Pothier*, therefore, if it be a case *in dubio* where the Domicil is, the original Domicil must prevail. The same rule is laid down in *Denisart* (q).

The meaning of *Pothier* also appears to be, that when a man has left his acquired Domicil without getting another, his original Domicil revives. There is a Case in *Cochin* (r) of the Marquis de St. Parterre, which bears some analogy to the present. The Marquis resided sometimes at *Paris*, sometimes in the Province of *Mayenne*, where he was born, and they decided that it ought to be presumed that he intended to preserve his original Domicil.

(p) Coutumes d'Orleans, Introduction Générale aux Coutumes, chap. 1, s. 7.

p. 514, pl. 12, 13.

(r) Œuvres de Cochin. tom. 5, p. 5.

(q) Tit. Domicil, tom. 1.

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In the case of *La Virginie* (s) Sir *William Scott* says, "It is always to be remembered that the native character easily reverts, and that it requires fewer circumstances to constitute Domicil, in the case of a native subject, than to impress the national character on one who is originally of another country."

There is no Case either in the Roman or any other Law exactly in point; but all the Authorities show, that in a case of doubt, of equilibrium, the original Domicil must prevail.

In the Case of *Chiene v. Sykes*, determined by Sir *William Grant* in 1811, of which there is no printed Report, the circumstances were very similar to this Case, and the *Master of the Rolls* referred it to the *Master* to ascertain what the Law of *Scotland* was, and where was his Domicil, and the *Master* found he was domiciled in *Scotland*, and an Order was made that his Property should be distributed according to the Law of *Scotland* (t).

(s) 5 Robinson's Admiralty Reports, 99.

(t) That Case was thus:—

*Margaret Chiene, Widow, v. James Sykes and others.*

*Robert Chiene*, the late Husband of the Plaintiff, by his Will, dated the 9th day of November 1801, and by a Codicil thereto, dated the 29th

day of January 1802, amongst other things, gave his Wife the Interest of certain Sums for her Life. The Defendant *Sykes*, one of the Executors, proved the Will and Codicil in the Prerogative Court of *Canterbury* shortly after the Testator's Death in the year 1802. The Bill was filed by the Widow against the acting Executor and Legatees of her Husband's Will, praying an Account of the

They will perhaps contend on the other side that the acquired Domicil was not renounced, and that coming from *India* to *London* was only changing his situation

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Testator's Personal Property, and that a moiety thereof might be paid to her; but if the Court should decree against such Claim, that the Will of her Husband might be established.

The Court, by a Decree, dated the 27th of April 1807, referred it to a *Master* to inquire, among other things, where the Testator, *Robert Chiene*, was domiciled at the time of his Death. The *Master*, by his Report, dated the 11th of February 1808, certified that by the Deposition of *William Brown*, Postmaster of the Royal Burgh of *Crail* in *Scotland*, the said *William Brown* made Oath that he knew *Robert Chiene* the Testator from his Infancy; that the said *Robert Chiene* was born in the Town of *Crail*, and as the Deponent believed, in the House of his maternal Grandfather, with whom his Mother resided at that time: that the said *Robert Chiene* was a natural Child of *John Chiene*, Shipmaster in *Crail*, and *Anne Brown*, residing there; that the said *Robert Chiene* received his Education at the School of

*Crail*, during which time he resided with his Mother; and when seventeen or eighteen years of age he entered into the seafaring line, and went abroad as a Sailor; that he the said *William Brown* had particular occasion to know that the said *Robert Chiene* returned to *Crail* again in the year 1784, from the circumstance of his the said *William Brown's* being Postmaster at that time, and having inspected the quarterly Bills of the Office he found entries of Letters to a *Robert Chiene* in that year; that he the said *William Brown* could not with precision say how long the said *Robert Chiene* remained at *Crail* at this time, but that he was certain he again went abroad in less than twelve months, and resumed his occupation as a Seaman; he the said *William Brown* having reason to believe, from seeing Letters addressed to him, that he was appointed Master of the *Experiment* Frigate; that the said *Robert Chiene* returned to *Crail* again in the year 1802, and resided there till his Death, which happened in November in that year: that some years before

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from one place to another, within the province of *Canterbury*, and that his acquired Domicil was not thereby lost. It may be admitted that the *East Indies* and the

his return, he the said *William Brown* understood that a Dwelling House and Garden, and some other subjects, in the Burgh of *Crail*, were purchased for him and his Brother jointly: that on his return to *Crail* last mentioned he rented a House, in which he resided for some months, till he got one, purchased for himself, repaired, when he went to reside in it, and continued to do so till his Death; that the said *William Brown* was informed, in the year 1780, by *Elizabeth Wilkinson*, his Brother's Wife, that the said *Robert Chiene* was, some time previous, married to *Margaret Wilkinson* at *Philadelphia*, where she, *Elizabeth Wilkinson* was present at the time; and he received the same Information from her Husband, *Patrick Brown*, and the Brother of him the said *William Brown*; that he had heard that it was the said *Robert Chiene's* intention to buy some Land in the Neighbourhood after his last return, and from which he the said *William Brown* inferred, that it was his the said *Robert Chiene's* intention to reside at *Crail* in future.

And by the Deposition of *Andrew Whyte*, Town Clerk of the Royal Burgh of *Crail*, the said *Andrew Whyte* made Oath that he knew the said Testator, *Robert Chiene*, for about eighteen years previous to his Death: that he understood the said *Robert Chiene* to have been a Native of the Burgh of *Crail* before named, but that he had left that place and gone abroad before he the said *Andrew Whyte* became acquainted with him, which happened in the year 1784, on his return from abroad to his native place: that on his aforesaid return he became Tacksman of a Rabbit-warren in the Neighbourhood of the Burgh of *Crail*, which he held for one season under him the said *Andrew Whyte*, and again went abroad in the course of the following year: that he again entered into the seafaring line to which he was originally bred, and did not return to his native place at *Crail* till the year 1802: that some years previous to his return last mentioned, he caused to be purchased, jointly with *John Chiene* his Brother, a Dwelling House, Granary,

*Colonies*, in the politic sense of the word, are part of the Mother Country, but for the purpose of Domicil they are foreign to this Country.

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and two Gardens, in the Burgh of *Crail*, all which had previously belonged to their Father, and were sold for behoof of his Creditors: that on the said *Robert Chiene's* return to *Crail* last mentioned, he at first rented a House, in which he lived for some months, and thereafter removed to the one purchased by him and his Brother, after the last had undergone some repairs, and lived in it till his Death, which happened in the month of November following: that on his said last-mentioned return to *Crail*, he informed him, the said *Andrew Whyte*, that he was married to a Lady who resided in *Philadelphia*, and with a view of settling an Annuity on his Wife, he employed him, the said *Andrew Whyte*, to purchase some Land in the Neighbourhood of *Crail*; and that the said *Andrew Whyte* made an offer for same accordingly, but did not obtain the purchase. And that by the Deposition of *Robert Murray*, the said *Robert Murray* made Oath that he knew the said Testator, *Robert Chiene*, for a period of thirty years before his Death, and from the time he was a Boy at School:

that he had heard the said *Robert Chiene* was born at *Crail*, and that at the time the said *Robert Murray* knew him at School, he resided with his Mother, *Anne Brown*, at the Town of *Crail*: that the said Deponent, *Robert Murray*, went abroad himself early in life, and did not return to *Crail* till the year 1787, so that he knew not the early part of the said *Robert Chiene's* history, intervening betwixt his leaving the School at *Crail*, and his return to that place after mentioned: that he knew the said *Robert Chiene* returned to *Crail* in the year 1802, where he resided till his Death, which happened in the month of November in the said year: that he understood, although he had no particular occasion to know the same, that some years previous to the said *Robert Chiene's* return to *Crail*, as before mentioned, a Dwelling House, with Gardens, with some other Property, was purchased on account of him and his Brother jointly in that Burgh: that on the said *Robert Chiene's* return he at first rented a House at *Crail*, in which he resided for some months, and afterwards

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Mr. *Bell*, Mr. *Horne*, and Mr. *Abercrombie*, for the  
Defendants:—

We contend that Dr. *Munroe* never abandoned his *English* Domicil, but that he retained it up to his Death. As your Honor is perfectly acquainted with all the facts of the case, it is not necessary to detail them. They say it is apparent from the Will that he intended to go to *Scotland* for the purpose of residing there; but by the Will he makes a Provision for his Nephews and Nieces, and gives a great part of his Fortune to his Wife. At the time he made his Will he intended to leave *India*, and he makes a Disposition for the Expenses of the Voyage to *England*. He says, if she does pay her Expenses she is to have 8,000 Rupees, &c. Now, if he had an intention of returning to reside in *Scotland*, the effect would have been to render the Will

removed to the one he had purchased, after it had undergone some repairs, and resided therein till his Death: that he had heard the said *Robert Chiene* married a Sister of the Wife of *Patrick Brown*, deceased, some time a Captain of a Merchant Ship, and a Native of *Crail*, a Brother of Mr. *William Brown*, the then present Postmaster of *Crail*, and that he had heard that the said *Robert Chiene's* Wife had resided, and still resided, in *America*. And the said *Master* further certified that three several Letters, appearing to have been written by the Testator to the Plaintiff, bearing date respectively the 1st day

of November 1801, the 21st day of March 1802, and the 25th of August 1802, had been exhibited to him, and the handwriting of the said Testator, proved by an Affidavit of *William Penrose*, of, &c. made in the said Cause, on the 12th day of December 1807, the contents of which Letters, inasmuch as they appeared to him to show the said Testator's intentions as to Residence, he had set forth in the Third Schedule annexed to his Report; and the said *Master* was of opinion that the said Testator was domiciled in *Scotland* at the time of his Decease; and the Decree was accordingly.

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a complete nullity, and would, in effect give to his Wife and Sister that part of his fortune which it was his intention should be divided amongst his Nephews and Nieces. It is impossible, therefore, to conclude that at the time he made his Will he intended to return to *Scotland*.

The VICE-CHANCELLOR:—

You need not trouble yourself upon that part of the Case; you may assume it to be quite clear, that when he arrived in *England*, he had no settled intention where he should fix his abode.

*Argument continued:—*

Dr. *Munroe*, by his residence in *India*, acquired an *English* Domicil; *Bruce v. Bruce* is an authority for that; and in *Somerville v. Somerville* it was observed, that in *Bruce v. Bruce* the question was, whether the property should be administered according to the Law of the Province of *Canterbury*, or according to the Law of *Scotland*; whether his Domicil should be considered as in *England* or in *Scotland*. There is no question here about an *Indian* Domicil. There is no such thing: An *English* Domicil may be acquired in *India*, but there is no such thing as an *Indian* Domicil, contra-distinguished from an *English* Domicil. The Personal Estate of a Person domiciled in *India* is distributable according to the Law of *England*, and just the same as if he resided in *England*; the same Law prevails in all the Colonies. It has been made a question, whether, if this Gentleman had gone to *France*, on his return from *India*, instead of coming to *England*, his original Domicil would not have revived. If a Person residing in *India* acquired a Domicil here, and had died on his return, it could not be said he had acquired



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a new Domicil; and it would be difficult to say, that by giving up of his *Indian* Habitation he had abandoned his *English* Domicil. If so, any Person coming from the North, and travelling for his health, would thereby abandon his *Scotch* Domicil. *Ommancey v. Bingham* was the case of a Scotchman who had acquired an *English* Domicil by serving in the Navy, and a residence in *England*, but he died in *Scotland*, on a temporary visit; and the House of Lords held that he was domiciled in *England*. It is clear, therefore, that Death at a place does not constitute a Domicil there. In the Marquis of *Annamdale's* Case (x), it was held he was a domiciled *Englishman*. The original Domicil cannot be changed, unless by an acquired Domicil; but when a Domicil is acquired, it requires as much to alter that Domicil as it did to abandon the original Domicil; both are on the same footing, as to abandonment; neither can be lost unless a new Domicil is acquired. The passages in the Roman Law do not seem to apply to the question of Domicil as it relates to the distribution of a man's Property, but only as it related to public Burthens and Offices. There are some other Passages in the *Digest* (y), and also in the *Code* (z), besides those already quoted, but they fall within the observation before made on Domicil, as treated in the Civil Law. The most pertinent doctrine is to be found in *Pothier* (a) and *Demisart* (b). The former says, "*Une personne ne peut à la vérité, établir son Domicile dans un lieu qu'animo et facto, en s'y établissant une Demeure.*" The latter says, "*Deux choses*

(x) *Bempde v. Johnstone*,  
3 Ves. 199.

(y) Lib. 50, tit. 16, s. 203.

(z) Lib. 10, tit. 39, s. 7.

(a) Coutumes d'Orléans Introduction générale, chap. 1,

s. 9.

(b) Art. Domicile, 513.

*sont nécessaires pour constituer le Domicile, 1° l'habitation réelle; et 2° la volonté de la fixer au lieu que l'on habite."*

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It is quite clear that Dr. *Munroe* had acquired an *English* Domicil by his residence in *India*, there is both the *animus* and the *factum* in support of that. The circumstance of his quitting *India* did not change his Domicil. If he had quitted *India* with an intention of going to *Scotland*, and had arrived there with an intention of not going to any other place, then it might have been contended that he had assumed his original Domicil, but that was not so. His dying in *Scotland* did not alter the nature of his Domicil. It was the same as if he had died in *England*. Some years before he left *India* he intended to return to *Scotland*, but he could not have so intended when he made his Will, for the reasons before stated. They must show an intention to return to *Scotland*, finally to reside there, and that he executed, or was in the execution of, that intention. We have shown by evidence that he did not mean to make his final residence in *Scotland*. *Denisart* (c) says, that is only a man's Domicil which is the Domicil of fact and intention, and that the original Domicil of the Father and Mother shall be taken to be his Domicil until he has got another, and that it shall be presumed that he has retained his Domicil until there is proof to the contrary. He does not say, as is contended on the other side, that if a man has acquired a new Domicil, and afterwards leaves his Habitation, he entirely divests himself of that Domicil, although he might not have acquired a new one; on the contrary, he says, that a man cannot lose his original Domicil until he has *animo et facto*

(c) Tit. Domicile, s. 11.

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acquired another; he does not mean to say that the *Domicilium originis* is any stronger than that which the man acquires himself, and it seems that the same principle applies to an acquired, as to an original, Domicil. Before an acquired Domicil can be lost, it must be shown, not only that he has abandoned the acquired Domicil, but also that a new Domicil is acquired. If a man goes to any place not with an intention of fixing his Domicil there, but with an intention of returning, he does not acquire a new Domicil; but the instant a man has acquired a Domicil, there must be, as *Pothier* and *Denisart* say, not only the *animus* but the *factum* of a new Domicil before the acquired Domicil can be lost. All the authorities are to that effect.

In Sir *Charles Douglas's Case (d)*, it was much argued upon the hardship of holding his Domicil to be in *England*, in order to give effect to a Forfeiture; Lord *Loughborough* takes notice of the consequence that would arise from his being considered as domiciled in *Scotland*, as that would have the effect of subverting his Will. In *Somerville v. Somerville (e)*, Lord *Alvanley* states the proposition we contend for, namely, that the last Domicil is to be considered as the Domicil of a man until he acquires another; and that can only be acquired *ex animo et facto*. Much has been said about the attachment which a man feels for his original Domicil—for the place of his home, and where he has been brought up: but suppose a child born in *England*, during a visit there of his Father and Mother, who were natives of *Scotland*, he would be a domiciled Scotsman, although he might never have been in *Scotland*. What attachment could he feel towards his original Domicil? his attachment would be to

(d) *Ommaney v. Bingham*, 18th March 1796.  
before the House of Lords, (e) 5 Ves. see p. 787.

the place where he was brought up. It is decided, that it is not a man's Domicil which is the place of his birth, but that which is the Domicil of his Father and Mother, for which he may have no attachment whatever. In *Bempde v. Johnstone* (e), Lord Loughborough held the Marquis of *Annandale* was to be considered as domiciled in *England*, observing, "that he never had a Residence in *Scotland*. He never was there, at any period, with a fixed intention of remaining. His existence there was purely a purpose of either visit or business, and both circumstanced and defined in their time. Wherever he had a place of Residence that could not be referred to an occasional and temporary purpose, that is found in *England*, and no where else." In another passage (f), observing also, "the Cause has the additional circumstance that he happened to die in *Scotland*, the place of his birth; but undoubtedly he went there for a very temporary purpose, a mere visit to his family, when going to take a command in the *American Service*."

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Unless they prove that there was an actual abandonment of the acquired Domicil, and an intention, in execution, of resuming his original Domicil, the *Domicilium originis* can have no effect. In the passages quoted from *Voet* he does not say, the *Domicilium originis* cannot be changed, but that it is to be taken to be a man's Domicil, until he has, *ex animo et facto*, acquired another. If he has acquired another Domicil, such Domicil is the effect of his own choice, and may therefore be presumed to be more preferred than the *Domicilium originis*.

(e) 3 Ves. 201.

(f) 3 Ves. p. 203.

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What *Voet* says, applies as strongly to an acquired, as to an original, Domicil. There are other passages in *Voet* (*h*) which show in what manner a Domicil may be acquired; but whether the Domicil be original, or acquired, it can only be lost by an intention to abandon it carried into execution. “*Non tamen in dubio presumenda facile domicilii mutatio; sic ut eam allegans, tanquam rem facti, probare teneatur* (*i*).”

The inference we draw from the passages in *Voet* is, that until a Man has acquired another Domicil, he must, *ex necessitate*, retain his acquired Domicil, and that he cannot acquire another by intention only. Here, as in *Bruce's Case*, Dr. *Munroe*, by his residence in *India*, acquired an *Indian-English* Domicil. What then deprived him of it?

It cannot be doubted from the Evidence, as your Honor has intimated, that this Gentleman had not determined to reside in *Scotland*. He must be considered as domiciled in *England*, and his Property must be distributed according to the intention expressed in his Will.

The VICE-CHANCELLOR:—

It is settled, by the Case of Major *Bruce*, that a residence in *India*, for the purpose of following a Profession there in the service of the *East India* Company, creates a new Domicil. It is not to be disputed, therefore, that Dr. *Munroe* acquired a Domicil in *India*.

It is said, that having afterwards quitted *India* in

(*h*) Comment. ad Pandectas. Lib. 5, tit. 1, pl. 96, 97.

(*i*) Ib. pl. 99.

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the intention never to return thither he abandoned his acquired Domicil, and that the *forum originis* revived. As to this point, I can find no difference in principle between the original Domicil and an acquired Domicil; and such is clearly the understanding of *Pothier* in one of the Passages which has been referred to.

A Domicil cannot be lost by mere abandonment. It is not to be defeated *animo* merely, but *animo et facto*, and necessarily remains until a subsequent Domicil be acquired, unless the Party die *in itinere* toward an intended Domicil. It has been stated, that, in point of fact, the Testator went to *Scotland*, in the intention to fix his permanent Residence there, but this statement is not supported by the Evidence.

It has also been stated, that the Testator, knowing he was in a dying state, went to *Scotland*, in order to lay his bones with his ancestors, but this too is clearly disproved.

It may be represented as the certain fact here, that when this Gentleman left *England*, on his visit to *Scotland*, he had formed no settled purpose of permanent Residence there, or elsewhere.—That he meant to remain a few months only in *Scotland*, and to winter in the South of *France*, and with this fluctuation of mind on the subject of his future Domicil, he was surprised by death, at the house of a relation, in *Scotland*.

I am of opinion, therefore, that Dr. *Munroe* acquired no new Domicil after he quitted *India*, and that his *Indian* Domicil subsisted at his Death.

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A Domicil in *India* is, in legal effect, a Domicil in the Province of *Canterbury*, and the Law of *England*, and not the Law of *Scotland*, is therefore to be applied to his personal Property.

1820.

21st June.

KAYE v. CUNNINGHAM.

*The Court will restrain a proceeding at Law against a Sequestrator, but has no authority to compel a Party to be examined pro interesse suo.* THIS was a Motion to restrain a Party from proceeding at Law against a sequestrator in possession, under an Order of Court; and that the Party might be examined *pro interesse suo*.

The VICE-CHANCELLOR:—

The Court will not permit its Officer to be drawn into a litigation which it cannot control; but it has no authority to compel a Party to be examined *pro interesse suo*. Such an Order can only be made upon the application of the Party, or by his consent.

HENLEY v. WEBB.

1820.  
5th July.

THIS was a Bill by a Widow, for Dower. The Husband being entitled to a sum of 14,200 *l.* in Court, to be laid out in Land, of which he would be Tenant in Tail, obtained from Sir *John Webb*, on the 15th September 1781, a Conveyance by bargain and sale of the Estate in question, in Fee; Sir *John Webb* covenanting that he was seised in Fee. On the same day he conveyed this Estate by Lease and Release to the Trustees of the 14,200 *l.* in consideration of that sum, which was also the price paid to Sir *John Webb*. He soon afterwards suffered a Recovery of that Estate, being equitable Tenant in Tail under the Trustees; and having thus obtained the Fee Simple of the Estate, he re-conveyed it to Sir *John Webb*, for the same sum for which he had purchased it; having, in fact, entered into an agreement with Sir *John Webb* that he would do so before the bargain and sale made to him; the intent of the Transaction being to make himself master of the 14,200 *l.*

*A Husband, before Lord Eldon's Act, borrowed an Estate for the purpose of suffering a Recovery, in order to acquire the Ownership of Money to be laid out in Land. Semble, his Wife is dowable of the Estate borrowed.*

Mr. *Sugden*, and Mr. *Pepys*, for the Plaintiffs.

Mr. *Bell*, and Mr. *Shadwell*, for the Defendants, who claimed under the Will of Sir *John Webb*, insisted, that the previous agreement made the Husband a Trustee of the Estate for Sir *John Webb*, and that the Wife therefore was not entitled to Dower. It was also further objected, on behalf of the Defendant, that Sir *John Webb* was never in fact seised in Fee of this Estate.



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As to the first point, the *Vice-Chancellor* expressed his opinion that the purpose of the Transaction was to make the Husband the absolute Owner of the Estate, and not a Trustee, in order that he might suffer a Recovery, and that he was to become a Trustee for Sir *John Webb* only after the Recovery suffered; and that the Wife's Right to Dower attached upon it when in possession of the Husband as absolute Owner, paramount to his character of Trustee, and he could afterwards only deal with it subject to Dower.

As to the second point, the *Vice-Chancellor* suggested that there might be great difficulty, upon the principle of Estoppel, for those who claimed under Sir *John Webb*, to set up an objection, contrary to the effect of his own Covenant that he was seised in Fee (a), but both points being legal, a Case was directed to be stated, for the opinion of a Court of Law.

1820.

12th July.

## MORGAN v. MORGAN.

*The Husband is Tenant by the Curtesy of the equitable Inheritance of his Wife, notwithstanding a Direction to pay the Rents and Profits to her separate use during the Coverture.*

THIS was a Bill filed by a Son against his Father, to avoid a Contract made between them, for the division of the price of Lands to be sold, upon the ground that the Contract proceeded upon the notion that the Father was Tenant for Life of the Lands, and the Son Tenant in Fee in Remainder, though in truth the Son, the Plaintiff, was Tenant in Fee in Possession.

The Lands in question had been the Estate of the Mother.

(a) See Anon. 12 Mod. 399.

By a Settlement made previous to the marriage of the Father with the Mother, the Estate of the Mother was conveyed to Trustees in Fee, as to a certain Estate called *Trevospert*, to the use of the Father for life, Remainder to the use of the Mother for life, Remainder to the Children of the marriage, as the Parents or the Survivor should appoint, Remainder to the use of the Mother and her Heirs, and as to all other the Estate of the Mother upon Trust, for the sole and separate use of the Mother for life, with power to the Mother to appoint the Fee by Deed or Will, and for want of Appointment, in Trust for the Mother, her Heirs and Assigns. The question was, whether, as to this latter Estate, the Father, who survived the Mother, was entitled to be Tenant by the Curtesy against her Son, the Mother having made no Appointment?

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v.  
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Mr. *Hart*, and Mr. *Daniel*, for the Plaintiff, admitted the general rule was, that a Husband was entitled to Curtesy in the Equitable Estate of his Wife, but contended, that the Rule did not apply in this Case, by reason, that during the Life of the Wife the Profits were to be paid to her separate use, and they cited the Case of *Herle v. Greenbank* (a), as directly in point.

Mr. *Beames*, for the Defendant:—

It will be conceded, that Courts of Equity give the Husband a Tenancy by the Curtesy of a Trust. Such Courts have likewise held, that there should be Curtesy of an Equity of Redemption, though the Mortgage was in Fee; *Cashbourne v. Scarfe* and *English* (b); and where there was a Bequest of 300*l.* to be laid out in land, and settled to the only use of *M.* and her Children, the Husband of *M.* was held entitled to Curtesy;

(a) 3 Atk. 715.

(b) 1 Atk. 603.

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*Sweetapple v. Bindon* (c); so, where there was a Devise to pay debts, and the Surplus to be conveyed to a *Feme*, the Husband was held entitled to a Curtesy in the Surplus. *Watts v. Ball* (d). But it is contended, that though the Husband is entitled to a Tenancy by Curtesy of a Trust, the present is the excepted Case; namely, where the property is settled to the separate use of the Wife; and for this they rely on *Herle v. Greenbank* (e). That Case, however, stands alone, and is not to be reconciled to Lord *Hardwicke*'s general doctrine in *Roberts v. Dixwell* (f); where he says, a Devise to the separate use would not bar the Husband, because there was, as here, a sort of seisin in the Wife; nor is *Herle v. Greenbank* to be reconciled to the doctrine of *Cashbourne v. Scarfe*, and *Sweetapple v. Bindon*, and *Watts v. Ball* (g). If *Herle v. Greenbank* be questionable, then, there was in the removal of doubt a sufficient consideration for the Agreement of the 14th September 1812, and that Agreement is good, as a family compromise, as in *Stockley v. Stockley* (h), and in *Stapilton v. Stapilton*, *Cann v. Cann*, and other Cases cited in *Stockley v. Stockley*.

8th August.

The VICE-CHANCELLOR:—

It must be admitted that the two Cases of *Herle v. Greenbank*, and *Roberts v. Dixwell*, cannot be reconciled, and between the conflicting opinions of Lord *Hardwicke*, recourse must be had to principle and analogy. At Law the Husband is entitled to the Curtesy, wherever the Wife, during the Coverture, is seised of an Estate of Inheritance, and has Issue by the Husband capable of that Inheritance.

(c) 2 Vern. 536.

(d) 1 P. Wms. 107.

(e) 3 Atk. 715. Vcs. sen.

(f) 1 Atk. 606.

(g) Watkins's Principles,

2d Ed. by Mr. Preston, p. 55.

(h) 1 Vcs. and Beam. 30.

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Equity follows the Law in the quality of Estates, and it is to be stated generally that a Husband will become Tenant by the Curtesy wherever the Wife, during the Coverture, is in possession of an Equitable Estate of Inheritance, and has Issue by the Husband capable of that Inheritance. There is no doubt here that the Wife had an Equitable Estate of Inheritance, notwithstanding the Rents and Profits were to be paid to her separate use for Life. Lord *Hardwicke* admits this proposition in *Herle v. Greenbank*, and it is so expressly decided in the Case of *Pitt v. Jackson* (i), where the Conveyance being directed to the Daughter, a Feme Covert in Tail, there was, notwithstanding, a direction to pay the Rents and Profits to her separate use during the Coverture: and this doctrine has also the authority of Mr. *Fearne* in his book of Contingent Remainders, in his Comments upon the Case of *Roberts v. Dixwell*. The Wife was in possession of this Equitable Estate by receipt of the Rents and Profits during the Coverture, and there being Issue capable of the Inheritance, the Husband, according to the rule stated, must be entitled to the Curtesy; unless it can be held that the direction that the Wife shall take the Profits to her separate use, amounts to an express intention to exclude him. At Law, the Husband cannot be excluded from the enjoyment of Property given to or settled upon the Wife; but in Equity he may, and this not only partially, as by a direction to pay the Rents and Profits to the separate use of the Wife during Coverture, but wholly, by a direction, that upon the death of the Wife the Inheritance shall descend to the Heir of the Wife, and that the Husband shall not be entitled to be Tenant by the Curtesy: such a provision was actually made in the Case of *Bennett v. Davis* (k), and was

(i) 2 Bro. C. C. 51.

(k) 2 P. Wms. 316.

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acted upon by this Court. Here the Husband is partially, and not wholly, excluded from the enjoyment of his Wife's Property. This Court would, according to the intention of the Settlement, have restrained him from all interference with the Rents and Profits during the Life of the Wife, but there being no further exclusion expressed in the Settlement, the Court can have no authority to restrain him from the enjoyment of his general right as Tenant by the Curtesy in the Equitable Inheritance of his Wife. Bill dismissed.

1820.

15th July.

BLAND v. LAMB.

*The construction of a Residuary Clause does not depend upon the particular Property which the Testator might have in his contemplation; but upon what the Words which he has used will embrace according to their ordinary import.*

THE Testator, *Thomas Bland*, stating himself, by his Will, to be possessed of two Sums of Stock, amounting together to 63,000*l.*, gave Legacies to the whole amount. He then bequeathed certain articles of Plate, his Clothes and Gems, and concluded his Will thus;—"any thing that I have forgot, I leave at the disposal of Mrs. *Bland* of *Isleworth*; all my Wines are her's."

Mrs. *Bland*, who was also a Legatee of 1,000*l.* a year for her Life, died before the Testator; and he afterwards made a Codicil to his Will, containing the following expression, "I may have forgot many things, such as money due to me from Government, &c. If such there is, it is to be thrown into the lump, for the benefit of the Legatees, to be paid to them in proportions."

The Testator before his death acquired a large further property by the death of a relation.

The question in the Cause was, as between the Legatees and the next of Kin, whether the Codicil amounted to a general Residuary Bequest, and would therefore embrace this particular Property.

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Mr. *Benyon*, Mr. *Bell*, Mr. *Phillimore*, and Mr. *Pemberton*, on the part of the next of Kin, contended, that the Codicil was a Gift only of such things as the Testator possessed at the time of making it, and which he had forgotten to specify; things, *ejusdem generis*; of the money due from Government; *Attorney-General v. Johnson (a)*, was cited.

The *Counsel* on behalf of the Legatees were stopped by.

The VICE-CHANCELLOR:—

The Question is not what the Testator had in his contemplation when he made his Codicil, but what the Words he has used will embrace, according to their ordinary signification; which must prevail, unless qualified by other Expressions in the Instrument.

A Testator, when he gives his Residue, may contemplate only the actual state of his property at the time, and may mean to give, and may think he is giving, next to nothing, but such residuary Legatee will nevertheless take an after-acquired million.

This Testator, after making his Will, recollected that he had forgotten to dispose of the arrears of his pay from Government. He was sensible that there might be other things of which he had power to dispose by Will, which he might also have forgotten. Whatever he might have forgotten, it is to be thrown into the lump, for the benefit of his Legatees. He had forgotten

(a) *Ambl.* 190.

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that Residue, which might arise by a lapsed Legacy or future acquisition, and I cannot say that the Words he has used will not embrace it (b).

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1820.

19th and 28th  
July.

AGUILAR v. AGUILAR, LOUSADA, and others.

*A Wife, who pledges her separate Property for the Debt of her Husband, is entitled to have his Property comprised in the*

*same Security first applied, as between the Wife and Husband and his general Assignee.*

*Where a Wife has an adequate Settlement to her separate use, she is not entitled to a further Provision out of a Life Interest to her, which the Husband takes jure mariti, except in case of his Desertion or*

THE Plaintiff, who was the Wife of the Defendant Aguilar, having Property to her separate use, joined her Husband in a Grant of an Annuity, and the Grant comprised as well the separate Property of the Wife, as Property given to the Wife for Life, not to her separate use, and to which therefore her Husband was entitled *jure mariti*.

The Wife joined with the Husband in granting other Securities, which were charged upon her separate property alone. The Husband afterwards took the benefit of an Insolvent Debtor's Act, and his Debts being considered of small amount, he subsequently granted two Annuities charged on the Wife's Life Interest, to which he was entitled *jure mariti*.

On account of the novelty and importance of some of the Questions which arose in this Case, it was twice argued by Mr. Hart, Mr. Wetherell, Mr. Wingfield, Mr. Sidebottom, and Mr. Sugden, who appeared for the different Parties concerned.

(b) Vide *Crooke v. De Vandes*, 11 Ves. 330.

*Insolvency. A Feme Covert may file her Bill to avoid an Annuity charged upon her separate Property, without offering to repay the Consideration; nor is there any Lien for the Consideration upon her separate Property.*

The *Vice-Chancellor* held, first, that the Wife, being a Surety only in the Grant of Annuity, which comprised her Husband's Property as well as her own, was entitled as between her and her Husband, and the Assignee under the Insolvent Debtor's Act, and the subsequent Annuitants, to have the Husband's income first applied in satisfaction of the Annuity. Second, that she was not entitled, as she prayed, to have any provision as against the Assignee, under the Insolvent Debtor's Act, and the subsequent Annuitants out of that Life-Interest given to her, which the Husband took *jure mariti*; because she had an ample separate provision for maintenance secured to her by Settlement, as well as a further separate provision under the will of a relation; and that the principle upon which this Court gave such a provision out of Property of this description against the Husband, when he deserted the Wife, and against his general Assignee in case of his bankruptcy, or insolvency, was, that the Law when it gave the Wife's Property to the Husband, imposed upon him the obligation of maintaining her, and if he failed in that obligation, either by the desertion of his Wife, or by his inability to assist in her support, this Court would fasten that obligation upon the Property itself; that this principle did not apply where the Wife had secured to her a competent separate maintenance. Third, that the Wife was entitled to avoid the Grant of Annuities, in which she had joined her Husband, and for which she had pledged her separate Estate, on account of the defect of the Memorial, without offering by her Bill to repay the actual consideration; and that this Court could give no Lien for that consideration upon her separate Property;—that Equity followed the Law in the return of the money paid, and, that as at Law the Annuitant could recover the price,

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when the consideration failed, so in Equity it was a term of its relief, that the party seeking to avoid the Annuity, should offer to return the price (a); but that this

(a) This conclusion appears to be founded on a very ancient rule in Chancery, of great justice, and of very general application, "*That he that will have equity done to him must do it to the same Person.*"

It is on this principle, that no one can come into a Court of Equity to be relieved against an oppressive Deed, even in the character of Heir apparent dealing for his expectations, except on tender of the Purchase Money; and if a man seeks to have Securities delivered up as being usurious, he must, by his Bill, offer to repay the Money advanced, or the Bill may be demurred to\*. The act of *Anne* invalidates Securities affected with usury, as entirely as the Annuity Act (17 Geo. 3, c. 26), does Deeds of which there is no sufficient memorial; but in both cases the Party advancing the Money has a right at Law to keep the Deeds; and if from a real or fancied mischief, that might arise from the Grantee's possession of the Deeds, a Bill is filed to have them delivered up:—The Court says, "we will not give

you the Deeds unless the Money advanced is repaid."

It is a term, a condition, on which the Court affords relief, and is insisted on, not because the Bill can, in strictness, be considered in the light of redemption, or because there is a lien on the Deeds, for they are invalid to all intents and purposes, but because the Court will not assist the Plaintiff, unless he will do on his part what is equitable, and therefore decrees in analogy to a case of redemption, or of lien, ordering a repayment of the Consideration Money and interest, *minus* the payments made by the Grantor in respect of the Contract. If an Annuity is not set aside for any fraud in the transaction, but merely for a mistake or omission in form, it is unconscientious in the party to retain the consideration, and on that ground it is that an action lies to recover it. See *Shove v. Webb*, 1 T. R. 735.

In a recent case, however, there is a contrary *dictum* of Lord *Eldon*. The passage to which I allude, is rather obscure, but I gather from it

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\* *Mason v. Gardiner*, 4 Bro. C. C. 437.

general doctrine did not apply to the Case of a *feme covert*, for at Law, though she might avoid the Annuity,

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this proposition, — “Though the principle of this Court is not to give relief to those who will not do equity, yet on a Bill by the Grantor to have an Annuity Deed delivered up as void under the statute, he is entitled to that Relief, without accounting for the consideration paid for the Annuity, leaving the Annuitant to proceed at Law\*.” There is a similar *dictum* also in *Battine v. Baxxelgette*†. The weight even of a *dictum*, from such a Judge, more especially when repeated, is, confessedly, great; but, with the utmost deference, I am unable to discover the principle, or the decisions, on which it is founded. Most of the Cases on the subject are referred to in Mr. *Swanston’s* Note‡. In some of them, the Grantor of the Annuity was *Defendant*, where no terms could be imposed; in others, the Plaintiff offered an Account by his Bill. Such terms were offered by the Bill in *Byne v. Vivian*||; a fact not noticed in the Report, but which I have ascertained from

the *Registrar’s* Book. None of these Cases, therefore, are authorities in support of the *dictum* alluded to; in other words, none of them prove, that if terms had not been offered, a Bill for the delivery up of the Deeds could have been sustained. If even the Heir at Law of the Grantor, (where the Annuity is for the Grantee’s Life, and partly secured by real Property so inadequate, as to render a Memorial necessary,) or the Grantor’s Assignees in Bankruptcy, or under the Insolvent Act, could maintain such a Bill, (points I do not find determined) it is difficult to conceive the principle on which the Grantor himself could support such a Bill. The general opinion of the Profession has been that such a Bill is untenable, and this is evidenced by the fact, that in all the Cases where the Grantor has filed the Bill, terms have been offered. The general opinion has been, that relief, in all cases where Deeds are sought to be delivered up,

\* *Davis v. Duke of Marlborough*, 2 Swanst. 157.

† 2 Swanst. 156, in note.

‡ 2 Swanst. 157, note (b).

|| 5 Ves. 604.

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yet no action would lie against her for the price paid; and by analogy, the Annuitant was not entitled to such relief in Equity; that the Cases of the Duke of Bolton v. Williams (b), Harris v. Jones (c), and Angell v. Hadden (d), had fully established that there could be no Lien for such price on her separate Estate; and the reason was plain; a *feme covert* could not, by the Equitable Possession of separate Property, acquire a power of contract; she had a power of disposition, as incident to Property, and her actual disposition or appointment of the Property, would bind her. This Court would apply her separate Property in payment of an Annuity which she had charged upon it; but it could not apply her separate Property in repayment of the consideration of that Annuity which she had not charged upon it. Being incapable of contract or general engagement, this Court could not fasten upon her separate Property those Equities which arise out of contract and general engagement (e).

"is always," as Lord Abinger expresses it, "*upon terms* \*." To say that the Grantor shall have his Deeds, and that the Grantee shall be driven into a Court of Law to recover his Consideration Money, is not merely a diminution of his means of enforcing payment, but seems to be an unnecessary multiplication of suits, of trouble and expense,

which a Court of Equity always endeavours to avoid, and even entertains Bills to prevent.

(b) 4 Bro. C. C. 297; S. C. 2 Ves. jun. 138.

(c) 9 Ves. 486.

(d) 16 Ves. 205.

(e) See *Greatly v. Noble*, ante, vol. 3, p. 94; and *Stuart v. Lord Kirkwall*, 388, 9.

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\* *Bromley v. Holland*, 5 Ves. 618.

*Ex parte* HUSBAND *in re* BLACKBURN.

11 August.

ON the 15th of June, 1814, a joint Commission issued against *Isaac* and *Peter Blackburn*. The Petitioners were Creditors by Bills of Exchange drawn by *Isaac Blackburn* upon *Peter Blackburn*, and accepted by him. *Isaac* and *Peter Blackburn* at that time carried on business as Ship-Builders at *Plymouth*, in partnership; but in the name of *Isaac Blackburn* only; *Peter* carried on a separate business as a Merchant in *London*.

*A Creditor, who has a right to elect between joint and separate Estate, must make his Election before a Dividend is declared of the Estate against which he has proved.*

The Bills, upon which the Debt arose, were in truth negotiated for the use of the partnership trade; but the Petitioners were, at that time, ignorant of the existence of the partnership. At the time of the Bankruptcy, the Petitioners were, however, aware of that fact; and at the second meeting, proved under the Commission as for a joint Debt. One of the Petitioners was chosen an Assignee.

*His Election is gone if he does any act in the character in which he has proved.*

The separate Estate of *Peter* appearing to be sufficient to pay 20s. in the pound, a Dividend was advertised accordingly for the 3d February 1816; but, in consequence of Creditors, who had been considered as joint, claiming against the separate Estate, the Dividend was adjourned to the 5th of February; and, on that day, a Dividend was declared of 5s. upon the separate Estate of *Peter*, and 1s. upon the joint Estate.

On the 24th July 1817, Messrs. *Bolitho*, who had

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HUSBAND  
*in re*  
BLACKBURN.

proved as Creditors for the Sum of 1,251 *l.* 7*s.* 5*d.* against the joint Estate, presented a Petition to the *Lord Chancellor*, praying that a Debt of 16,288 *l.* 19*s.* 11*d.* which had been proved by the Bank of England, against the joint Estate might be expunged, and that the Debt might be declared to be a separate Debt. This Petition was heard on the 19th August 1817, when the *Lord Chancellor* directed an Issue to try whether it was a joint or separate Debt, which was afterwards found in favour of the Bank of England; and the Petition of Messrs. *Bolitho* was in consequence dismissed with Costs. On the 29th of January 1820, a further Dividend of 10*s.* in the pound was declared on the separate Estate of *Peter*; and then, for the first time, the Petitioners applied to the Commissioners to have their proof transferred to the separate Estate, which being refused by the Commissioners, they presented their Petition, praying that they might be declared entitled to prove against both separate Estates, as well as the joint Estate, or, at least, that they might now be at liberty to elect to transfer their proofs from the joint Estate to the separate Estates.

The Petitioners had not received the Dividend on the joint Estate which was declared in February 1816. It appeared upon the Affidavits that Messrs. *Bolitho* had presented their Petition for the indemnity of the present Petitioners. At the hearing the Petitioners abandoned the Claim made by the Petition to a double proof; but they insisted they were now at liberty to wave their proof against the joint Estate, and to transfer the proof against the separate Estates.

Mr. *Montague*, in support of the Petition, cited *Ex parte*

*Adams in re Cooke (a), Ex parte Bigg in re Harrison (b),  
Ex parte Liddell (c), Ex parte Benson (d).*

1820.

*Ex parte*  
**HUSBAND**  
*in re*  
**BLACKBURN.**

Mr. *Wingfield*, and Mr. *Roots*, *contra*.

The *Vice-Chancellor* directed the Petition to stand over, in order that he might look fully into the authorities as to the waver of proof; and on a subsequent day, Judgment was given to the following effect:

A Creditor, who has a right of election, is not concluded by proof, because proof is necessary to enable him to vote in the choice of Assignees. But, without special circumstances, he is bound to make his election before a Dividend is declared of the Estate against which he has proved, for otherwise, to the extent of his Dividend, he suspends the division of the Property to the prejudice of the other Creditors. In this Case the Petitioners are too late to transfer their proof, not only because a Dividend has been declared of the joint Estate, but because they have acted as joint Creditors, by being in effect parties to the Petition of Messrs. *Bolitho*.

(a) 1 Ves. & Bea. 495.

(b) 2 Rose, 27.

(c) 2 Rose, 34.

(d) Cook, B. L. 268; and see  
Montagu's Dig. 1 vol. 243.

1820.

20th July.

*Although Defendant not bound to appear at a particular time, yet if he do appear, he is in Contempt after eight days from appearance.*

## HANWARST v. WELLETER.

THE Bill was filed for a Commission and an Injunction; and a Motion was now made for a Commission. For the Defendant it was objected that he had not answered, and was not in Contempt; and that the Plaintiff, therefore, was not entitled to a Commission. The Bill was filed on the 19th June, and the Defendant appeared on the 21st June, being the last day of Term; and the Plaintiff insisted, that although the Defendant was not bound to appear on that day, yet having appeared, he was in Contempt at the end of eight days.

The Case stood over for inquiry into the practice, and upon the Certificate of the *Registrars*, the *Vice-Chancellor* granted the Motion.

1820.

1st Nov.

*Injunction to restrain Mortgagor from cutting Timber, not granted, unless the Security be insufficient or scanty without the Timber.*

## HIPPESELY v. SPENCER.

IN this Case an Injunction was applied for by Mr. *Horne*, on behalf of a Mortgagee, to restrain the Mortgagor from cutting down Timber.

The *Vice-Chancellor* referred to a Case of *Sewell v. Pemly*, in which, upon communication with the *Lord Chancellor*, and with his approbation, he had stated, that he would not grant such an Injunction upon the application of the Mortgagee, unless it was made to appear that the Security would be insufficient or scanty without the Timber.

The Motion stood over for such an Affidavit.

FLEMING v. PRIOR.

1820.  
4th Nov.

THIS was a Petition on behalf of a Creditor, for leave to prosecute a Decree, made in a Suit instituted by an Administrator, with the Will annexed, against a Residuary Legatee, there being great delay in the prosecution of the Cause. *Leave given to a Creditor to prosecute a Suit.*

Mr. *Heald*, in support of the Petition, cited *Sims v. Ridge (a)*.

The VICE-CHANCELLOR :—

The Court by its Decree has assumed the Administration of the Assets of the Debtor, and would not permit this Creditor to proceed at Law for the recovery of his Debt. As he must abide by this Suit, it is surely reasonable that he should be at liberty to prosecute it when the proper parties for that purpose are guilty of delay.

Order made,

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HOWLETT v. WILBRAHAM,

1820.  
6th Nov.

ON a motion by the Plaintiff, that a Guardian might be appointed for the Defendant to put in his Answer, he being a Lunatic, and the fact being verified by Affidavit, an Order was made for that purpose.

(a) 3 Meriv. 463, 4.



1820.  
7th Nov.

WALKER v. WALKER and others.

*Where the discretion of a Trustee is to be exercised upon matter of fact, the Court will substitute the Master, but not where the discretion is to be exercised upon matter of opinion and judgment.*

THE Bill stated that *John Walker*, by his Will, dated the 17th of March, 1810, “gave and bequeathed unto *William Walker, Ann Hack Walker* and *Hester Walker*, their Executors, Administrators and Assigns,” a Freehold Estate in *Oxfordshire*, “upon Trust, to permit and suffer the Plaintiff, for and during the term of his natural Life, to receive and apply all the Benefit and Advantage arising from, or that might arise from the Testator’s said Estate to his own proper Use and Benefit, whether by his own Occupation and Possession thereof, or any Part thereof, should the Plaintiff be minded, or from the Rent or Rents, Profits and Advantages arising, or that might arise, therefrom, after the Testator’s Decease; and in case the conduct and behaviour of the Plaintiff, after the Testator’s Decease should be and continue to be for not less a time then the space of Seven Years at the least, from and after the Testator’s Decease, to the entire satisfaction and approbation of the said *William Walker, Ann Hack Walker* and *Hester Walker*, agreeing and signifying their unanimous approbation of the conduct and behaviour of the Plaintiff for the space of Seven Years from and after the Testator’s Decease, then and in that case the Testator declared it to be his Will, and he thereby gave and bequeathed his said Estate of Land, &c. unto the Plaintiff, his Heirs and Assigns for ever; but should the conduct and behaviour of the Plaintiff not be such as to merit and procure the confidence and good opinion of the said *William Walker, Ann Hack Walker* and *Hester Walker*,” the Estate was given to Plaintiff for Life; Remainder to his Children as Tenants in common in Fee on their attaining the age

of twenty-four respectively :—the Will then proceeds—  
 “ that if it should happen that the Plaintiff never should,  
 nor did, by his conduct and behaviour in the world,  
 merit and entitle himself to the confidence and good  
 opinion of the said *William Walker, Ann Hack Walker*  
 and *Hester Walker*, the Survivors or Survivor of them,  
 and the Executors, Administrators and Assigns of such  
 Survivor, so as to entitle himself to have, possess and  
 enjoy all Right and Title in and to the said Estate abso-  
 lutely, nor leave any Child or Children his lawful Issue  
 at his Decease arriving at the age of Twenty-four Years,”  
 the Testator devised the Estate to the said *William*  
*Walker*, Defendant in Fee.—The Testator died in  
 October 1810, leaving the Plaintiff, his eldest Son, Heir  
 at Law, the Defendants *William Walker, Ann Hack*  
*Walker* and *Hester Walker*, together with *Francis*  
*Walker*, his other Children.

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 and others.

*William Walker, Ann Hack Walker* and *Hester*  
*Walker*, soon after the Testator's Decease, entered into  
 possession of the devised Estate, and continued  
 therein until the 25th of March 1811, when the Estate  
 was given up to the Plaintiff. That on the Testa-  
 tor's Decease, the said Trustees possessed themselves  
 of and kept the Title Deeds, though the Plaintiff's  
 conduct was such as to entitle him to the confidence  
 of the Trustees, and had been so since the Testator's  
 Decease, a period of more than seven years.

The Bill *prayed* an Account of the Rents and Profits  
 of the Estate received by the Trustees since the Testa-  
 tor's Decease; that they might signify in such manner  
 as the Court should direct, the approbation of the Plain-  
 tiff's conduct and behaviour for the space of Seven  
 years from the decease of the Testator, convey the Fee

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simple of the Estate to Plaintiff, and deliver to him the Title Deeds relating thereto.

The Defendant *William Walker* by his Answer admitted the Receipt of the Rent until March 1811, and possession of the Title Deeds of the Estate; but stated “that he has not such confidence in the conduct and discretion of the Plaintiff as to induce him to think that it would be proper or conformable with the intention of the Testator, to give the Plaintiff the absolute control over the Estate, and the power of disposing of the same to the prejudice of his Children.”

Mr. *Horne*, and Mr. ——— for the Plaintiff;

Mr. *Bell*, and Mr. *Roupell*, for the Defendant, *William Walker*; and

Mr. *Wetherell*, for other Defendants.

The question was, whether the Court would take upon itself the exercise of a discretion vested by the Testator in Trustees?

The Cases cited were, *Gower v. Mainwaring* (a), *Brereton v. Brereton* (b), *Dr. Potter v. Dr. Chapman* (c), *Pink v. De Thussey* (d), *French v. Davidson* (e), *Brown v. Higgs* (f).

The *Vice-Chancellor*, (after stating the circumstances of the Case) held, that where the discretion of Trustees is to be exercised upon matter of Opinion and Judgment, as to which, well-intentioned Persons may differ, the Court cannot substitute the *Master* for the

(a) 2 Ves. 86, 110.

(b) Stated, 2 Ves. 86.

(c) Ambl. 98.

(d) Ante, 2 vol. 157.

(e) Ante, 3 vol. 396.

(f) 4 Ves. 708, 5 Ves. 495, 8 Ves. 561, and in Dom. Proc.

Trustees; but where the discretion is to be exercised upon matter of Fact, the Court will refer it to the *Master*.

The Decree was, amongst other things, "That it be referred to, &c. to inquire and state, whether the conduct and behaviour of the Plaintiff, for not less a time than the space of Seven Years at the least, from and after the Testator's Death, has been to the entire satisfaction and approbation of the Defendants *William Walker, Ann Hack Walker, and Hester Walker*, the Trustees; and whether they have agreed and signified their unanimous approbation of the conduct and behaviour of the Plaintiff, for the said space of Seven Years from and after the said Testator's Decease."

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and others.

CATTON v. Earl of CARLISLE.

1820.

10th Nov.

THE Bill was for the specific Performance of an Agreement. The Answer alleged that it had been agreed that the subject of the Suit should be referred. The Plaintiff filed a Supplemental Bill, stating that the Agreement of Reference had failed by a difference between the Arbitrators.

A general Replication was filed, and question was, whether this was a Replication to the whole Record, or only to the original Bill?

The *Vice-Chancellor* held, (after referring to the Registrar, Mr. *Croft*,) that the Supplemental Bill merely introducing supplemental matter to sustain the relief sought by the same Plaintiff from the same Defendant

*Where a supplemental Bill is not a supplemental Suit, but only introduces supplemental Matter, the whole Record is one Cause, and a general Replication, applies to the whole Record, and not merely to the original Bill.*

1820.

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CARLISLE.

by the original Bill, was not a supplemental Suit, and that there was only one Record, and one Replication, and one Cause, to be set down.

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1820.

15th Nov.

## GAIT v. OSBALDESTON.

*Bill for Discovery  
and to restrain  
Defendant from  
setting up out-  
standing Terms.  
Plea of Title to  
the whole Bill,  
overruled.*

THE Bill was for Discovery in aid of a Trial at Law, and for an Injunction to restrain the Defendant from setting up at Law an outstanding Term.

Plea, to the whole Bill, of Title in the Defendant.

Mr. *Rose*, in support of the Bill, contended, that the main purpose of the Bill was for a Discovery, to enable the Plaintiff to defend himself at Law, and that the relief prayed, in respect of outstanding Terms, was merely an incidental and collateral Relief; and that it had never been held that a Bill of Discovery can be met by showing a Title and a legal cause of Action.

Mr. *Sidebottom*, *contra*, insisted, that by the Plea, the Relief sought as to the outstanding Term, was answered, and it was shown a Discovery was unimportant and unnecessary; and that as by the Plea the Defendant's Title was stated, and a Discovery in fact given, if that were necessary, the Plaintiff was not entitled to any further Discovery.

The VICE-CHANCELLOR :—

The Plea of Title would have been good as to the Relief sought by the Injunction against the outstanding Term, but is not good as to the Discovery, because here the Discovery is not incidental to that Relief; and as to Discovery in aid of legal Title, the Plea of no legal Title is no Defence, for that is the very question which is to be tried at Law.

TIDD v. LISTER and others.

1820.  
20th Nov.

THE Bill in this Case was filed by a *feme covert* and her Husband, against the Trustees under her Father's Will, and prayed a legal Conveyance of a Life Estate, to which the Wife was equitably entitled by the Will, or for a Receiver, or for delivery of possession of the Estate.

*It is not of course to let the equitable Tenant for Life into possession. It must depend upon the intention of the Testator.*

The Will directed the Trustees to pay the Premiums of certain Policies of Assurance, in the first place, out of the Rents and Profits; and the Plaintiffs offered to bring as much Money into Court as would secure the Premiums.

The facts of the Case, and the questions raised, are fully stated in the Judgment.

The Claim to a Conveyance was abandoned; but Mr. *Sugden*, for the Plaintiff, insisted upon a Right to Possession, as a matter of course, and cited *Blake v. Bunbury (a)*.

Mr. *Hart*, Mr. *Bell* and Mr. *Palmer*, for the Defendant, *Lister*.

Mr. *Blackburne*, for the Trustees.

The VICE-CHANCELLOR :—

The Testator in this Case, after giving to his Wife and Daughter the personal occupation of the House in which he resided, and the use of his Furniture, has

1820.  
5th Dec.

(a) 1 Ves. jun. 194, 514; S. C. 4 Bro. C. C. 24.

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LISTER  
and others.

devised and bequeathed his whole Real and Personal Property to certain Trustees upon Trust, in the first place to pay his funeral Expenses and Debts, then to keep the Buildings upon his Estate, consisting of Freehold, Copyhold and Leasehold, insured against Loss or Damage by Fire; next to pay the Premiums of certain Policies of Assurance on the Lives of his two Sons, which are to form a provision for their Widows and Children; then to pay Annuities of Sixty Guineas each to his two Sons; and lastly, he has given the Surplus Income between his Wife and Daughter during their joint Lives, and the whole Surplus Income to the Survivor for Life; and in case his two Sons should survive his Wife and Daughter, then he gives to them his whole Real and Personal Estate. Soon after the Death of the Testator, a Bill was filed in this Court for the execution of the Trusts of his Will; and in the progress of that Suit, the Debts and Funeral Expenses were paid out of the Personal Estate, and the Residue of the Personal Estate was secured in the name of the *Accountant-General*, and is of an amount sufficient to satisfy the two Annuities of Sixty Guineas each, given to the Sons, who do accordingly receive the same from the *Accountant-General*. The Premiums of the Policies of Assurance continue to be paid out of the Rents and Profits of the Estates. The Mother died in the year 1819, and the Daughter, who is become entitled to the whole Surplus Income of the Real and Personal Estate, has married. The Mother, the two Sons, and two other Persons, were the Trustees named in the Will; one of these Persons is dead; the other has but little interfered in the Trusts of the Will; one of the Sons is abroad, and the management of the Property has principally devolved upon the Son, *William Lister*. The present Bill is filed by the Daughter and her Husband, praying, a Conveyance,

Surrender and Assignment of the legal Estate from the Trustees; and that the Plaintiffs may be let into Possession, or that a Receiver may be appointed. The Prayer for the Conveyance, Surrender and Assignment was abandoned at the Bar, but it was insisted that it is a matter of course in a Court of Equity, to divest a Trustee of the management of the Trust Property, and to deliver the Possession to the *cestui que* Trust for Life. And that the only difficulty here was, that the Trustees are in the first place directed to pay certain Premiums upon Policies of Assurance, which remained to be provided for out of the Rents and Profits of the Estates; and that to remove this difficulty the Daughter's Husband was willing to invest in the Cause a sum sufficient to answer the amount of those annual Payments; and the Case of *Blake v. Bunbury* (b) was cited as an authority for this doctrine.

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v.  
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and others.

My first impressions were strongly against the existence of any such Rule. It is perfectly plain from the continuing nature of this Trust, that the Testator intended that the actual Possession of the Trust Property should remain with the Trustees; and it did appear to me a singular proposition, that if a Testator who gives in the first instance a beneficial Interest for Life only, thinks fit to place the direction of the Property in other hands, which is an obvious mean of securing the provident management of that Property for the advantage of those who are to take in Succession, that it should be a principle in a Court of Equity to disappoint that intention, and to deliver over the Estate to the *cestui qui* Trust for Life, unprotected against that bias which he must naturally have to prefer his own imme-

(b) 1 Ves. jun. 194.



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mediate Interest to the fair rights of those who are to take in Remainder. Independently of the purpose of management of the Property, a Testator may be considered in the case of a Female *cestui que* Trust for Life, as having a further view to her personal protection in the case of her Marriage.

The Husband can only compel the Trustee to account to him for the Wife's Income by the aid of a Court of Equity; and this Court, in certain cases of misconduct by the Husband, will not compel the Trustee to account to the Husband, but will secure the Income for the benefit of the Wife. It is manifest that this protection would, to some extent, be prejudiced, if the Husband were put into the possession of the Trust Estate.

The Case of *Blake v. Bunbury* is no authority for the proposition for which it was cited. It was not the case of a *cestui que* Trust for Life, but the case of a legal Tenant for Life, subject to a term for raising a Charge. There was there no purpose but to raise the Charge, and the legal Tenant for Life, securing the Charge, had upon every principle a right to the possession. There may be cases in which it may be plain from the expressions in the Will, that the Testator did not intend that the Property should remain under the personal management of the Trustees.—There may be cases in which it may be plain from the nature of the Property, that the Testator could not mean to exclude the *cestui que* Trust for Life from the personal possession of the Property, as in the case of a Family Residence.—There may be very special cases in which this Court would deliver the possession of the Property to the *cestui que* Trust for Life, although the Testator's intention appeared to be

that it should remain with the Trustees, as where the personal occupation of the Trust Property was beneficial to the *cestui que* Trust, there the Court taking means to secure the due protection of the Property for the benefit of those in Remainder, would, in substance, be performing the Trust according to the intention of the Testator. The present Case is not one of special circumstances. It is not the personal occupation, but the management of the Property, that is sought by this Bill.

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and others.

The *cestui que* Trust for Life is a feme covert. Two of the Trustees are the Persons, who, if they survive the Wife, will be entitled to this Property. The Testator has thought fit to place his Property in their hands, and out of the management of the *cestui que* Trust for Life, and I have no authority to revoke his Will.

There is, however, in this Bill, a Prayer for a Receiver, and allegations of misconduct to support that Prayer. These Allegations are denied by the Answer, and not proved. But I find in the Answer, that the acting Trustee, *William Lister*, expresses himself to be willing that a Receiver should be appointed. If the Plaintiffs desire a Receiver, they are entitled to it, upon this consent of the Trustee.

1820.

21st Nov.

CURTIS and others v. RIPPON and others.

*The Testator gave all his Property to his Wife, trusting that she would use it for the spiritual and temporal good of herself and Children, remembering always the Church and the Poor. Held, that Wife took absolutely.*

THE Testator, *William Curtis*, appointed his Wife the Guardian of all his Children by his first and second marriage; and he then proceeded in his Will in the following Words, "I give, devise and bequeath all my Real and Personal Estates and Effects whatsoever, whereof I have any disposing power, to my said Wife *Elizabeth*, her Heirs, Executors and Administrators, trusting that she will, in fear of God and in love to the Children committed to her care, make such use of it as shall be for her own and their spiritual and temporal good, remembering always, according to circumstances, the Church of God and the Poor."

The Wife died; and Legatees under her Will filed the present Bill for an Account, and to ascertain their Interests.

The Question was, whether the Testator's Will created a Trust for the Children, or gave his Wife the absolute disposal of the Property?

Mr. *Bell*, and Mr. *E. Daniell*, for the Plaintiffs.

Mr. *Wetherell*, and Mr. *Raithby*, for the Defendants.

The *Vice-Chancellor* held the Wife absolutely entitled to the Property, there being no ascertained part of it provided for the Children, and the Wife being at liberty at her pleasure to diminish the Capital either for the Church or the Poor; that the plain intention of the Testator was to leave the Children dependent on the Wife.

ADAMS v. TAUNTON.

1820.  
27th Nov.

**HENRY** Byne by his Will, 1st September 1815, devised all his Estates to the Plaintiff, *George Adams*, and to *Ralph Carr*, their Heirs, Executors, Administrators and Assigns, in trust to sell the same by public Auction or private Contract, either together or in parcels, and to apply the produce amongst his Children, equally, and appointed the said *George Adams* and *Ralph Carr* Executors of his Will, and declared that the Receipts of *Adams* and *Carr* should be a sufficient discharge to the Purchasers. The Testator afterwards made a Codicil to his Will, by which he gave to his Son *Ralph* what he had by his Will given to his Son *Edmund*, but did not otherwise alter his Will.

*A Trustee of Real Estate for Sale, who has renounced his Trust, and released and conveyed to his Co-Trustee, is not a necessary Party in a Conveyance to a Purchaser, nor is it necessary he should join in a Receipt for the Purchase-money.*

The Testator died on the 20th June 1816. By a Deed-poll, 1st July 1816, under the hand and seal of *Ralph Carr*, reciting the Will and Codicil, and the Death of the said *Henry Byne* the Testator, and reciting that *Ralph Carr* was desirous of renouncing all and every the Trusts, Powers and Authorities reposed in him by the said Will and Codicil; it was witnessed, that in pursuance of such his desire and intention, and for certain good causes and considerations him thereunto moving, the said *Ralph Carr* did wholly and absolutely renounce and disclaim all and every the Estate, Powers, Authorities, Right, Interests, Trusts, Limitations, Appointments and Declarations to him given, devised, limited or appointed, as such Trustee as aforesaid, or intended so to be in and

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by the said Will and Codicil of the said *Henry Byne*, or either of them, or otherwise in him vested under and by virtue of the said Will and Codicil, or either of them, as one of the Trustees thereof respectively; and the said *Ralph Carr* did thereby, as far as he lawfully could or might declare, request and consent that all and every the Estates, Powers, Authorities, Rights, Interests, Appointments, Trusts and Declarations, in and by the said recited Will and Codicil, or either of them, devised to or vested in him the said *Ralph Carr*, jointly with the said *George Adams*, should from time to time, and at all times thereafter, remain, continue and be wholly and solely vested in the said *George Adams*, and his Heirs, Executors, Administrators and Assigns, upon the Trusts, and for the intents and purposes in and by the said recited Will and Codicil respectively declared of and concerning the same respectively.

The Plaintiff *Adams* alone proved the Will, and on the 21st October 1819, he put up parts of the Testator's Real Estates to sale by public Auction, and the Defendant became the Purchaser of four lots for the sum of 2,670*l*.

The Defendant refused to complete his Purchase, because *Ralph Carr* refused to join with the Plaintiff in the Conveyance to the Defendant, and to join in the Receipt for the Purchase-money, and in consequence the present Suit was instituted for a specific performance of the Purchase Agreement.

Mr. *Bell*, and Mr. *Girdleston*, for the Plaintiff, insisted, that in consequence of the Deed-poll of the 1st July 1816, the Plaintiff alone was enabled to convey

and give a sufficient Receipt for the Purchase-money, and they cited *Bonifant v. Greenfield* (a), and *Hawkins v. Kemp* (b).

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Mr. *Wyatt*, for the Defendant:—

The Defendant is desirous of completing his Contract, but as it has been a doubt in the Profession, whether the Co-Trustee ought not to join in the Conveyance and Receipt, the Defendant is justifiable in his objection, and is not compellable to take a Title subject to doubt. Mr. *Sugden*, in his work on Vendors and Purchasers, adverts (c) to the Case cited of *Hawkins v. Kemp*, and says, “ upon this point, however, a difference of opinion appears to prevail in the Profession.” In *Crewe v. Dicken* (d), one of two Trustees released and conveyed to his Co-Trustee, and he having sold, the Trustee who had released refused to join in the Receipt for the Purchase-money, and it was held, that the Trustee must be considered as having accepted the Trust, he having conveyed and released to his Co-Trustee; but that that part of the Trust that related to the application of the Purchase-money, he could not convey away; and the *Lord Chancellor* says, “ The hazard is not possibly great, but I do not know how to make the Purchaser run the hazard. Taking the Title with knowledge of the Trust, he would be bound to see to the application of the Money. I do not feel that I can make the Purchaser pass over this objection.”

The *Vice-Chancellor* expressed himself in favour of the Plaintiff, but said he would look into the Authorities.

(a) Cro. Eliz. 80; Leou. 60.

(c) 5th Edit. p. 453.

(b) 3 East, 410.

(d) 4 Ves. 97.

1820.  
6th Dec.

ADAMS  
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TAUNTON.

On this day the *Vice-Chancellor* said it being now settled that a Devise to *A. B. and C.* upon Trust, is a good Devise to such of the three as accept the Trust, it follows by necessary construction, that by the Receipt of the Trustees is to be intended the Receipt of those who accept the Trust.

A specific performance was decreed, but without Costs.

1820.  
7th Dec.

ORD v. NOEL.

*If the act of Sale by the Trustees takes place under circumstances which amount to a breach of Trust, this Court will not specifically perform the Contract.*

THIS was a Bill for the specific performance of a Contract for Purchase made by the Plaintiff. The Defendant, the Honourable Mr. *M. Noel*, conveyed the Estate in question to Trustees for Sale, upon trust to apply the Purchase-money in the first place in payment of a Debt due from his Father Sir *Gerard*, and the remainder to himself.

The Trustees appointed Mr. *L. Leake*, who was the Solicitor of the Creditor to be paid, to conduct the Sale. Mr. *L.* employed Mr. *Phillips*, an Auctioneer, to sell by private Contract, at Twenty-eight years Purchase, or by Auction. It was afterwards determined to sell by Auction alone, and the Property by the recommendation of Mr. *Phillips* was divided into Thirteen Lots.

On the morning of the intended Sale Sir *Gerard Noel* appeared at the time of Sale, and gave notice to the Auctioneer, and also by Hand-bills, that the Sale was without due authority, and that he would file Bills in Equity against the Persons who should purchase.

Notwithstanding this notice, Mr. *Phillips*, with the approbation of a Clerk of Mr. *L.* determined to proceed in the Sale, and it being doubtful in consequence of the effect produced by Sir *Gerard's* notice, whether the Sale in Thirteen Lots could be effected, the sense of the Company assembled was taken upon that point, who decided in favour of a Sale by Lots; and such a Sale was tried, but without effect. It was then proposed to the Company that the whole Estate should be put up in one Lot, and that mode was adopted principally as it seemed by the voices of the Plaintiff and one of his Friends. The Plaintiff was the only bidder, and it was knocked down to him at a price exceeding the Twenty-eight years Purchase, upon which it had at first been intended to sell by private Contract. The Twenty-eight years Purchase were calculated merely upon the subsisting Rent, and not upon any valuation.

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ORD  
v.  
NOEL.

Mr. *Phillips* communicated the Particulars of the Sale to Mr. *Leake*, and he made no objection, but acted upon it, and delivered the Abstract of the Title to the Plaintiff's Solicitor. The Defendant, Mr. *Noel*, afterwards applied to the Plaintiff to relinquish his Purchase as a matter of favour, which the Plaintiff declined to do.

It appeared from the Defendant's evidence that the Estate was undersold; and further, that the reason why Mr. *Phillips* pursued the Sale, was, that Mr. *Leake's* Clients, the Creditors, were anxious to raise Money without delay.

Mr. *Bell*, and Mr. *Barber*, for the Plaintiffs.

Mr. *Hart*, Mr. *Wingfield*, and Mr. *Pepys*, for the Defendants.



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The Cause first came on to be heard on the 8th March 1820, but it being suggested that Messrs. *Coutts & Co.* had an Interest in the Estate, which was the subject of the Contract, the Cause stood over, in order that they might be added as Parties.

It was afterwards stated, that Messrs. *Coutts & Co.* had released their Interest, and the Cause was now heard without their being made Parties.

The VICE-CHANCELLOR:—

If this Sale had been made by Auction, with all those circumstances of caution which a provident owner would have applied in the case of his own Property, it would form no objection to the specific performance of the Contract, that the Estate had not produced a full price. Those who sell by Auction submit themselves to the chance of competition, and must abide by it; nor is it any objection to this Sale, that it was made without the express authority of Mr. *Leake*, because it is plain that he adopted it with full knowledge of all that had passed at the Auction. Every Trust-deed for Sale is upon the implied condition that the Trustees will use all reasonable diligence to obtain the best price; and that, in the execution of their Trust, they will pay equal and fair attention to the interests of all persons concerned. If Trustees, or those who act by their authority, fail in reasonable diligence—if they contract under circumstances of haste and improvidence—if they make the Sale with a view to advance the particular purposes of one Party interested in the execution of the Trust, at the expense of another Party, a Court of Equity will not enforce the specific performance of the Contract, however fair and justifiable the conduct of the Pur-

chaser may have been. The remedy of the Law is open to such a Purchaser, but he has no claim to the assistance of a Court of Equity.

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In this case, I cannot but think that these Trustees made a mistake in giving an unlimited authority to Mr. *Leake*. He was the Agent of the Creditor, who having full security, had an interest only in an early Sale; and it was hardly fit that he should be intrusted with the rights of Mr. *Noel*, who had an interest not in an early Sale, but in a Sale at the best price. When Sir *Gerard Noel* had prejudiced the Sale by his notice, it is at first difficult to account for Mr. *Phillips*'s pursuing the Sale in any form. He had before given his deliberate opinion that the Estate would sell most advantageously in Lots, and yet he actually sells in one Lot only.

He adopts this disadvantageous mode by Sale in one Lot, not only under the prejudice occasioned by Sir *Gerard Noel*'s conduct, but without having invited competition by any previous notice that such a Sale would take place. The reason for all this is, however, found in the evidence of Mr. *Phillips*, and in the evidence of Mr. *Leake*'s Clerk, who is a witness for the Plaintiff. It appears that Mr. *Phillips* was induced to take these steps, because Mr. *Leake*'s Client, the Creditor, was anxious that Money should at all events be immediately raised.

My opinion therefore is, that this Sale was made under circumstances of great improvidence, and that the interests of Mr. *Noel* were sacrificed by it to the particular purposes of the Creditors, who were first to be paid out of the price of the Estate. This Court will not, therefore, aid the Plaintiff by a decree for the specific performance of

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the Contract, and the Bill must be dismissed ; but there being no imputation upon the conduct of the Plaintiff, let the Bill be dismissed without Costs.

1820.

25th July.

18th Nov.

6th Dec.

## PERFECT v. Lord CURZON.

*Where a Settlement makes the right of a Child to a Provision clearly depend upon its surviving both Parents, the intention must prevail; but where the expressions are ambiguous, the presumption is in favour of the Child.*

BY a Settlement made upon the intended Marriage of *Richard Asheton* and *Mary Halls*, a sum of 4,000*l.* secured by the Bond of *William Halls*, the Lady's Father, was settled upon Trust to pay the Interest to *Richard Asheton* for Life, and after his Death to *Mary Halls* for Life, and then followed these words, "and from and after the decease of them, the said *R. A.* and *M. Halls*, and the Survivor of them, then upon this further Trust, that in case there shall be but one Child living at the Death of the Survivor of them, the said *R. A.* and *M. H.* by the said *R. A.* on the body of the said *M. H.* to be begotten, they the said *R. N.* and *R. L.* (the Trustees) do and shall pay and apply the Interest of the said 4,000*l.* for and towards the maintenance and education of such Child, being a Son, until he shall attain the age of twenty-one years, or being a Daughter, until her age of twenty-one years, or day of Marriage, which shall first happen; and also do and shall pay and assign the said 4,000*l.* and the Bond or Security for the same, and all Interest and Produce thereof undisposed of, unto such only Child at his or her age of twenty-one years, or day of marriage respectively." And the Settlement went on to provide, that in the event of there being more than one Child living at the Death of the Survivor of them, the said

*R. A.* and *M. H.* the Interest and Capital should in like manner be paid, applied and divided equally between them.—“ And in case the said *M. H.* shall happen to die in the Lifetime of the said *R. A.* and there shall be no Issue of the said intended Marriage living at her Death, or in case all and every such Child or Children shall happen to die after the said *R. A.* and *M. H.* and after the Survivor of them, and before the said 4,000*l.* shall vest in him, her or them respectively, as aforesaid, by virtue of the limitations aforesaid, then upon Trust that they (the Trustees) do and shall pay, assign and transfer the said 4,000*l.* and the Bond or Security for the same, or so much thereof as shall not have been disposed of by the said *M. H.* in pursuance of the power hereinafter given to her, and all the Interest and Produce thereof which shall be then due and payable, and which from thenceforth shall become due and payable, unto the said *R. A.* and his Assigns, in case he shall be then living, and shall survive the said *M. H.* or in case he shall be then dead, then unto his Executors or Administrators ;” there afterwards followed in the Settlement a Proviso, “ that in case there shall be no Issue of the said intended Marriage, or in case all such Issue shall happen to die in the Lifetime of the said *M. H.*, and she shall them survive, or in case all and every Child or Children of the said intended Marriage shall happen to die after the said *M. H.*, and before the said 4,000*l.* shall vest in him, her or them respectively, by virtue of the limitations aforesaid, that then and in either of the said cases it shall be lawful for the said *M. H.*, notwithstanding her Coverture, to give and dispose of the sum of 2,000*l.* part of the 4,000*l.* to such person, and to such uses, intents and purposes, as she shall think fit.”

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Of this Marriage there was a Son and a Daughter. The Daughter attained twenty-one and married, and died, leaving Issue, before the death of the Survivor of *R. A.* and *M. H.* and the Question in the Cause was, whether such Daughter took a vested Interest in a moiety of the 4,000*l.*? The point was twice argued by Mr. *Bell*, Mr. *Stewart*, Mr. *E. Daniel*, and Mr. *Grant*. The Cases cited were, *Woodcock v. Duke of Dorset* (a), *Hotchkin v. Humphry* (b), *Routh v. Routh* (c), *Powis v. Burdett* (d), *King v. Hake* (e), *Hope v. Lord Cliefden* (f), *Wingrave v. Palgrave* (g), *Howgrave v. Cartier* (h).

The VICE-CHANCELLOR:—

This Settlement is to be tried by the Rule which is stated by Sir *W. Grant* in the Case of *Howgrave v. Cartier* (i). If this Settlement clearly and unequivocally throughout all its provisions makes the right of a Child to depend upon its surviving both its parents, then a Court of Equity has no authority to control that Disposition; but if this Settlement be in any of its provisions ambiguously expressed, so as to leave it in any degree uncertain, whether it was intended that the right of a Child should depend upon the event of its surviving both its Parents, then the Court is bound by authority to declare upon what may be called the presumed intention in Instruments of this nature, that the interest of a Child, though not to take effect in possession until after the Death of both Parents, did, upon the limitations

(a) 3 Bro. C. C. 569.

(b) *Ante*, vol. 2, p. 65.

(c) 2 Eden, 3.

(d) 9 Ves. 428.

(e) 9 Ves. 438.

(f) 6 Ves. 499.

(g) 1 P. Wms. 401.

(h) 3 Ves. &amp; Bea. 87.

(i) *Ibid.*

in this Settlement, vest in Sons at twenty-one, and in Daughters at twenty-one or marriage.

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In Settlements of this description there are two sets of Clauses to be considered:—The Clauses of Gift to the Children, and the Clauses of Gift over to others upon failure of the Children, and the Authorities require that both sets of Clauses should be clearly and unambiguously expressed.

In this Settlement the Clauses of Gift to the Children are clearly and unambiguously expressed. There is clearly no direct Gift to any Child who is not living at the Death of the Survivor of the Parents. If it were equally clearly and unambiguously expressed, that the Gifts over were to take effect in every event, unless some Child survived both Parents, there would be no ground for acting upon any presumed intention in favour of the Children, and the clear expressed intention must prevail. The first Gift over is, “in case the said *M. H.* shall happen to die in the Lifetime of the said *R. A.* and there shall be no issue of the said intended Marriage living at her Death, or in case all and every such Child and Children shall happen to die after the said *R. A.* and *Mary H.* and after the Survivor of them, and before the said 4,000*l.* shall vest in him, her or them respectively, as aforesaid, by virtue of the limitations aforesaid, then upon trust,” &c. &c.

In the first place, as was observed at the Bar, there is great inaccuracy in the expression, “or in case all and every such Child and Children shall happen to die,” there being no proper antecedent to the word “such;” and in order to make sense of the expression, it is necessary to supply after “or” the words “being Child

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or Children of the Marriage," in case all and every such Child or Children shall happen to die. In the next place, there is great inaccuracy in the expression, "in case all and every such Child or Children shall happen to die after the said *R. A.* and *Mary H.* and after the Survivor of them," for the Children here spoken of are necessarily Children only, who should be living at the Death of *M. H.* and yet the form of the sentence supposes that such Children might die in her Lifetime.—But there remains an ambiguity of still more importance—the expression is, "in case all and every such Child or Children shall happen to die after the said *R. A.* and *Mary H.*, and after the Survivor of them, and before the said 4,000*l.* shall vest in him, her or them respectively, as aforesaid, by virtue of the limitations aforesaid;" by this latter branch of the sentence must be intended, "before they shall attain twenty-one being Sons, or twenty-one or marriage being Daughters," for this was the effect of the limitations referred to; now let the case be put that all Children who survived *M. H.* attained twenty-one and died afterwards in the Lifetime of the Father, and then the Question is to be asked, whether in that event the 4,000*l.* is by this Clause clearly given over? The Answer is, that the expression imports that the Gift over is to take effect only in case all Children living at the Death of *M. H.* shall survive the Father, and die before twenty-one, and does not apply to the case in which such Children died in their Father's Lifetime, and did attain twenty-one. The Clause of Gift over, to which I am now referring, is in favour of *R. A.* and is subjected to a Power of Appointment in *Mary H.* as to a moiety of the 2,000*l.* In the Clause which gives her this Power similar expressions are used, and it will be found that in that Clause, as well as in this, the Gift over in the case of

Children living at her Death is expressed to be in the event of such Children surviving their Father, and dying before their interest vested by virtue of the limitations aforesaid; or, in other words, dying before they attained twenty-one, or being Daughters, before they married. Upon the whole, therefore, although in the Clauses of Gift to the Children, there is clearly no direct Gift to any Child who does not survive both Parents, yet in the Clauses of Gift over upon failure of the Children it is, to say the least of it, not clearly and unambiguously expressed that the Gifts over are to take effect in every event unless some Child should survive both Parents; I am bound, therefore, by the Authorities to say, that the presumed intention in favour of the Children must prevail here; and that the Daughter who attained twenty-one, and who happened also to marry, and afterwards died in the Lifetime of one of her Parents, took a vested Interest, to which the Plaintiffs are now entitled.

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The Costs out of the whole fund.

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SHORTLEY v. SELBY.

**T**HIS was a Creditor's Suit, and on the usual Decree the *Master* had made his Report of Debts, and payments to the Creditors had been ordered on further Directions.

The Plaintiff's Solicitor, Mr. *Macdougall*, refused to attend at the *Accountant-General's* Office with the *Master's* Report, in order that Creditors might obtain their Debts, unless they would pay him a Shilling in the

1820.  
 9th Dec.  
*If, in a Creditor's Suit, the Plaintiff does not call for Contribution, according to the Decree, before a Creditor is admitted to prove, he waves all claim to Contribution.*



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Pound on the amount of their Debts, which he claimed as their proportion of the expenses of the Suit, including extra Costs; and also 6s. 8d. for his trouble in attending *Accountant-General* and the *Registrar* with the Report and Papers in the Cause.

Two Motions were now made by different Creditors, that the Plaintiff's Solicitor might be ordered to attend the *Accountant-General* with the Report.

Mr. *Hart*, for the Motion.

Mr. *Bell*, *contra*.

The VICE-CHANCELLOR :—

The form of a Decree in a Creditor's Suit, is, that before Creditors are admitted under the Decree they are to contribute to the expense of the Suit, a Sum to be settled by the *Master*; and if a Plaintiff in such a Suit fails to pursue the Decree, and to call for Contribution to be settled by the *Master*, he waves all claim to Contribution. The Plaintiff's Solicitor has therefore no right to the deduction of the one shilling in the Pound, which he has claimed, and he must attend the *Accountant-General* with the Report, upon the application of every Creditor, on being paid the usual Fee of 6s. 8d.

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One of the Creditors in this Case had tendered this Fee to the Plaintiff's Solicitor, and the *Vice-Chancellor* gave him the Costs of the Motion; the other Creditor not having tendered the Fee of 6s. 8d. the *Vice-Chancellor* gave no Costs as to his Motion.

FARRER and ELIZABETH his Wife, and MARY REEKS, Spinster, v. WYATT and others.

1820.  
14th Dec.

SIR G. Hampson moved, that the Record in this Cause might be amended, by making *Thomas Neate* a Party with *Mary* his Wife, heretofore *Mary Reeks*, spinster, in addition to *William Farrer* and *Elizabeth* his Wife, the Plaintiffs first named in the Suit; and that the name of *Mary Reeks*, spinster, might be expunged, she having intermarried with the said *Thomas Neate* prior to the filing of the Bill; or that the said *Thomas Neate* might be at liberty to go in before the Master, to whom the Cause stood referred, and be made a Party to the Account directed by the Decree to be taken, no Report having been made by the Master.

The Bill was by Legatees against Executors, for the usual Accounts and payment of their Legacies.

An Affidavit was filed by the Plaintiffs Solicitor, who stated, that the Marriage of the Plaintiff, *Mary Reeks*, took place previously to the filing of the Bill, but that he was ignorant of the same until after the Decree; and that *Thomas Neate* the Husband, according to the best of the Deponent's knowledge, information and belief, was not in any manner conusant of any of the said proceedings until after the said Decree had been obtained.

*Habergham v. Vincent* (a) was cited in support of the Motion.

(a) 1 Ves. jun. 68.

*Bill filed by two Persons, and by Mary Reeks, stated in the Bill to be a Spinster. The Cause was heard and a Decree made; Mary R. at the time the Bill was filed was married, but it was not known to her Solicitor, nor did her Husband know of the Suit until after the Decree. On a Motion, consented to, the Court directed that the Husband, on undertaking to be bound as if he had originally been a Plaintiff, should be at liberty to prosecute the Decree.*

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FARRER  
and others

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WYATT  
and others.

Mr. *Wray*, for the Defendants, consented to the Motion.

The VICE-CHANCELLOR :—

Upon the Husband's undertaking to abide by the Proceedings in the Cause, and to be liable for the Costs, let him be at liberty to go in before the *Master*, and act upon the Decree as if he were named a Party upon the Record.

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1820.

18th and 19th  
Dec.

*Bill filed to re-  
move a Trustee  
was referred for  
impertinence.*

*Principles to be  
applied to such  
a Case.*

Earl of PORTSMOUTH v. FELLOWS.

THE Bill was filed, either to have it declared that the Trusts of a Deed, executed by the Plaintiff, were determined, or that the Defendant, the Trustee, might be removed.

The Defendant moved that the Bill might be referred for impertinence, and the *Master* having reported the passages complained of to be pertinent, the Defendant took exceptions to his Report.

These Exceptions now came on to be argued.

Mr. *Bell*, and Mr. *Belt*, for the Exceptions.

Mr. *Treslove*, *contra*.

The VICE-CHANCELLOR :—

If a Bill be filed by a *cestui que* Trust for the purpose of removing a Trustee, it is not scandalous or impertinent to challenge every act of the Trustee as miscon-

duct, nor to impute to him any corrupt or improper motive in the execution of the Trust, nor to allege that his conduct is the vindictive consequence of some act on the part of the *cestui que* Trust, or of some change in his situation; but it is impertinent, and may be scandalous, to state any circumstances as evidence of general malice or personal hostility, because the fact of malice or hostility, if established, affords no necessary or legal inference that the conduct of the Trustee results from such motive, and because such a course of Proceeding tends to render a Bill in Equity an Instrument of Inquisition into the private life every Trustee.

1820.  
 Earl of  
 PORTSMOUTH  
 v.  
 FELLOWS.

Exceptions overruled.

HEWSON v. REED.  
 GARTSIDE v. REED.

1820.  
 18th Dec.

THE Testator gave certain Legacies of Stock, being part of Stock stated to be standing in his Name in the Books of the Bank of England.

*Where a Testator gives Stock standing in his Name, and has no Stock in his Name, but has Stock in the Name of Trustees, parol Evidence is admissible of the mistake.*

He had no Stock in his Name; but the Stock to which he was entitled was standing in the Name of the Trustees. The Bill was filed by the Legatees, and they brought parol evidence to show the mistake.

Mr. Hart, and Mr. Sugden, for the Legatees, cited *Selwood v. Mildmay* (a).

The *Vice-Chancellor* held, that parol evidence of this fact was admissible, and that his Will would pass the Stock in the Name of the Trustees.

(a) 3 Ves. 306.

1820.

20th Dec.

## ATTORNEY-GENERAL v. PLUMPTREE.

*Where a sole Relator dies, the Application for a new Relator must be made by the Attorney-General.*

THIS was a Charity Information, and the Relator being dead, Mr. Glynn applied, on behalf of the Defendant, that A. B. might be named Relator.

Mr. Mitford, for the *Attorney-General*, contra.

The *Vice-Chancellor* ruled, that such an Application must be made by the *Attorney-General*, and that the Defendant could not choose his own Prosecutor.

JOHN SPENEER WOOLLETT, - - Plaintiff;  
and

ROBERT HARRIS, GEORGE LLOYD, and  
EDWARD COLLIS, - - - Defendants.

1821.

14th January.

*Testatrix bequeaths all her Estate and Effects to R. H. and G. L. and the Survivor of them, his Executors, Administrators and Assigns, upon Trust; and,*

*after some specific dispositions, gives to R. H. 50 l. and to G. L. all her Plate, &c. and after directing that the said R. H. and G. L. shall retain their Costs, and shall not be liable, except for wilful loss, and for payment of Debts, &c. she gave the Residue to J. S. for life, and if he should leave issue, to descend to them; and appointed R. H. and G. L. her Executors. J. S. survived the Testatrix, and died without Issue. His personal Representative held to be entitled.*

CATHARINE COLLIS by her Will, dated the 8th March 1814, bequeathed all her Estate and Effects whatsoever to Robert Harris and George Lloyd, (two of the Defendants) and the Survivor of them, his Executors, Administrators and Assigns, upon Trust, after sundry specific dispositions, as follows; "To my good Friend Robert Harris, my Executor, I bequeath the sum

of 50*l.* and to *George Lloyd*, my other Executor, I give and bequeath all my Plate, Linen, China and Household Furniture of every description whatsoever, save and except such as I may hereafter specify in a Codicil to this my Will; and I will and direct that my said Executors, out of the Monies bequeathed to them upon the Trusts aforesaid, deduct and retain their Costs, Charges and Expenses occasioned in the execution of the Trusts hereby in them reposed, and that they shall not be answerable or accountable for the deficiency or insufficiency of any Security on which the said Monies shall be placed, or for any loss or accident occasioned thereby, so that the same might happen without their wilful default or mismanagement; and after the payment of my just Debts, testamentary and funeral Expenses, I give the residue of my Estate to the said *Robert Harris* and *George Lloyd*, and the Survivor of them, his Executors and Administrators, upon Trust to pay the Dividends and Proceeds thereof, as they shall become due, to my Brother, *Joseph Collis*, of, &c. to be received by himself for his own use, during the term of his natural Life; a Receipt, given in his own hand-writing, being a sufficient discharge for the same; but if my said Brother shall at any time transfer, assign, or in any manner dispose of his Interest in any part of the Property bequeathed to him by me, or in default of the Receipts being given in his own hand-writing, it is my will, from the Date of such Transfer and Assignment or Instrument, or from the date of the last Receipt given by him, my Executors, *Robert Harris*, Esq. and *George Lloyd*, and the Survivor of them, his Executors and Administrators, shall take the entire management and disposal of all the Estate and Monies bequeathed to my said Brother *Joseph Collis*, into their own hands, to appropriate the same to his own use in such a manner as shall appear

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to them most conducive to his benefit, nor shall they be accountable to any person whatsoever; but should my Brother at his decease leave Issue lawfully begotten, it is my will, that all my Estate and Monies, bequeathed by me to him, shall descend to them; and that my aforesaid Executor shall make an equal division thereof among the said Issue, and appropriate the Interest, Dividends and Proceeds, as they shall arise and become payable, to their education, support and maintenance, in equal Shares, till they respectively attain the age of twenty-one years, when they shall each receive their respective Shares of the Principal; and if either of them should die during his or her minority, then the Share of such Child or Children shall be divided equally among the Survivors; but if one only should survive, or if my said Brother at the time of his decease should leave only one Child lawfully begotten, then it is my will that only one moiety of the said Dividends and Proceeds shall be appropriated to his or her education, support or maintenance, and that the Interest of the remaining moiety, as it becomes due, be added to the Principal, and accumulate till he or she shall attain the age of twenty-one years, when the whole shall be paid to such only Child"; and the said Testatrix thereby appointed the said *Robert Harris* and *George Lloyd* to be Executors of her Will, and by a Codicil added thereto gave and bequeathed to *Sarah Neate*, therein named, certain specific Articles.

The Testatrix died, leaving her Brother *Joseph Collis* surviving, her only Brother and next of kin, but he afterwards died without lawful Issue, having by his Will appointed the Plaintiff his personal Representative.

I was not present during the argument.

The VICE-CHANCELLOR:—

The question in this Case is, whether, in the event which has happened of the death of *Joseph Collis* without leaving any Child, the Executors take the residuary Estate beneficially, or as Trustees for the next of kin? In other words, whether, upon this Will, it appears to have been the intention of the Testatrix, that the Executors should take the whole Personal Estate as mere Trustees, or should take the whole Property of the Personal Estate charged only with the specific Trusts declared by the Will? This same question occurred in the case of *Dawson v. Clarke* (a), which has been referred to, and as to one view of this Case different opinions were formed upon it by Lord *Eldon* and Sir *William Grant*. The expressions here are however different, and the judgment in *Dawson v. Clarke* does not govern this Case. The Testatrix begins her Will with a Gift to her Friends, *Robert Harris* and *George Lloyd*, and the Survivor of them, his Executors and Administrators, of all her Estate and Effects whatsoever. She afterwards gives Legacies to those two Friends, calling them Executors; she then speaks of the Trust Monies bequeathed to her said Executors, and at the conclusion of the Will she appoints them Executors in formal terms. It must therefore be considered, that when she gave all her Estate and Effects to those two Friends, she had formed the purpose of naming them Executors, and the effect is in this respect the same as if, in the Gift itself, she had described them as her Executors hereinafter named, which were the words used in *Robinson v. Taylor* (b), and much relied upon by Sir *William Grant* in *Dawson v. Clarke*. The Gift is, “upon Trust” to pay

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(a) 15 Ves. 409; S. C. on Appeal, 18 Ves. 287,

(b) 2 Bro. C. C. 589; S. C. 1 Ves. jun. 44.



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to her Cousin the Dividends of 350*l.* Navy five per cent. Annuities, for Life; and after her Death to pay the same Dividends to other Persons for Life; and on the decease of the Survivor, the Principal is to sink into, and become a part of, her residuary Estate; she then gives and bequeaths certain other Legacies, pecuniary and specific, and amongst them a Legacy of 50*l.* to one Executor, and a Legacy of Plate and Furniture to the other Executor; she then directs that her said Executors, out of the Monies bequeathed to them upon the Trusts aforesaid, should retain their Charges and Expenses in the execution of the Trusts thereby reposed in them, and should not be answerable for the insufficiency of any Security on which the Trust Monies should be placed; and after the payment of her just Debts, testamentary and funeral Expenses, she gives the residue of her Estate to the said *Robert Harris* and *John Lloyd*, and the Survivor of them, his Executors and Administrators, upon Trust to pay the Dividends and Proceeds to her Brother *John Collis*, with a special Provision in case he should attempt to assign his Interest; and after his Death, the Principal is to be divided between his Children, or paid to an only Child. This *John Collis* is now dead, without leaving any Child. The material consideration is, whether the first Gift of all her Estate and Effects to her Friends, *Robert Harris* and *John Lloyd*, is not a Gift to them as mere Trustees? The expression is, I give to them all my Estate and Effects whatsoever upon Trust, but then follow the words, “to pay to my Cousin the Dividends of 350*l.* five per cent. Annuities, for her Life.” These words, “to pay to,” are not repeated as to any subsequent Legacy; every other Legacy has the words, “I give, or I bequeath”, without reference to the Trust. But every other Legacy must of necessity be satisfied by those who take in the first place all her

Estate and Effects whatsoever; and the words, "upon Trust," not admitting therefore of the sense, that they are to apply only according to the literal force of the expression, to the payment of the Dividends of the 350*l.* Navy five per cent. to her Cousin, must receive a general sense, and are to be understood as importing, that the whole Gift of her Estate and Effects whatsoever is a Gift to them upon Trust. This sense is fortified by the direction, that her said Executors shall retain their Costs, Charges and Expenses out of the Monies bequeathed to them upon the Trusts aforesaid, and by the declaration, that they shall not be answerable for the insufficiency of any Security upon which the said Trust Monies shall be placed. Then follows the declaration, that after the payment of her just Debts, testamentary and funeral Expenses, she gives the residue of her Estate to the said *Robert Harris* and *John Lloyd*, upon Trust to pay the Dividends and Proceeds to her Brother, remainder over to his Children. Taking all her Estate and Effects to have been in the first place given to *Harris* and *Lloyd* upon Trust, or as mere Trustees, the construction of this Clause is, that after the Trustees have satisfied the Legacies, Debts, testamentary and funeral Expenses, they are then to execute certain Trusts as to her residuary Estate. It has turned out, that the Trusts so declared have not exhausted the residuary Estate; but considering that the true effect of this Will is, that the Executors are to take the whole Estate and Effects upon Trust, they are necessarily excluded from all beneficial interest in any part of it, and my Decree must be, that, as to this residuary Estate, they are Trustees for the next of kin.

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1821.

15th Jan.

ROSS v. SHEARER and others.

*On a Bill filed against the Bank, and others claiming Stock, and praying an Injunction against the Bank to prevent a Transfer,*

*a Subpœna was served on the Bank, with Notice not to permit a Transfer.*

*The Answers were afterwards put in, but no Injunction was moved for by the Plaintiff.*

*The Defendants moved for an Order that the Bank might be at liberty to permit a Transfer; and an Order was made to that effect, unless, on or before a given day, the Plaintiff should move for an Injunction to restrain the Transfer.*

THE Plaintiff by his Bill claimed certain Stock standing in the Name of two of the Defendants, and amongst other things, prayed an Injunction against the Governor and Company of the Bank of England, to restrain them from permitting a Transfer, or payment of the Dividends.

On the filing of the Bill, the Governor and Company of the Bank were served with a Subpœna, together with a Notice, stating that a Bill had been filed, and what its object was.

The Defendants put in their Answers, by which it appeared that the Plaintiff had no claim to the Stock.

The Plaintiff did not apply for an Injunction. Some of the Defendants now moved, that the Bank should be at liberty to permit the two Defendants, in whose Name the Stock stood, to transfer the same, and to pay to them the Dividends.

The Plaintiff did not appear to the Motion, though served with Notice.

Mr. Bell, and Mr. Pugh, for the Motion, observed, that the service of the Subpœna on the Bank, together with the Notice, operated as an Injunction to restrain a Transfer; that if the Plaintiff had moved for an Injunction, it would have been successfully urged that he was not entitled to the same, and the restraint on the transfer of the Stock would have been

taken off; but as he refused to move for an Injunction, the only mode of releasing the Property was by this application; and that it would be great injustice to restrain the Transfer until the hearing of the Cause, which might be delayed at the caprice of the Plaintiff, and with a view to delay the payment of the Costs of the Suit.

1821.

ROSS

v.

SHEARER  
and others.

The VICE-CHANCELLOR:—

Let the Bank of England be at liberty, on or after the last day of next Term, to permit the Defendants *Dickie* and *Inglis*, to transfer the Stock in question, unless in the mean time the Court shall grant an Injunction to restrain such Transfer (a).

HARVEY v. WOOD.

1821.

15th Jan.

THE Bill stated that *William Wood*, the Defendant, in the year 1807, borrowed 50*l.* of *William Hinton* (since deceased), for the securing of which, with Interest, at a day long past, he gave a Promissory Note, dated the 17th July 1807:—That *Hinton* died in February 1810, making the Plaintiff his residuary Legatee and Executor, and he proved the Will:—That Interest on the Note was paid up to the 17th July 1809, but from that time the Principal and Interest remained due:—That the Defendant carried on the business of a Grocer, and being requested on the death of the Testator to pay the Promissory Note and Interest, it was agreed, that as

*No set-off allowed in this Court in respect of legal demands, although there cannot be a set-off at law, the demands being in autre droit.*

(a) *Sed vide Birch v. Corbyn*, 1 Cox, 144; on a Motion by  
1 Bro. C. C. 571; S. C. the Bank.

1821.

HARVEY

v.

WOOD.

the Plaintiff intended to deal with the Defendant, the Note should be taken in satisfaction *pro tanto* of Articles furnished to the Plaintiff:—That such dealings were carried on until April 1815, when the amount of the Plaintiff's Debt was 102*l.* 9*s.*:—That a Payment was made of 50*l.* leaving a balance of 52*l.* 9*s.* due to the Defendant, which the Principal Money and Interest due upon the Note would more than repay:—That Defendant has called upon the Plaintiff to pay the 52*l.* 9*s.* and Plaintiff having informed the Defendant that he had mislaid the Note, the latter, in Trinity Term 1820, commenced an Action against the Plaintiff for the 52*l.* 9*s.* The *Prayer* of the Bill was, that it might be declared that the Plaintiff is entitled in Equity to set off the Principal Money and Interest due on the Note against the sum of 52*l.* 9*s.* for which the Action was brought, and that the Defendant might be decreed to pay the same, and that the Defendant might be restrained by Injunction from proceeding in the Action at Law.

The Defendant, by his Answer, admitted the Note given to the Testator, and that it had not been paid; but stated, that it was due long before his Death, and that he believed it had never been in the possession of the Plaintiff, but was, from motives of friendship, destroyed by the Testator, with a view to release the Defendant from the payment of the Debt:—That from the month of January 1810, the Plaintiff had dealt with the Defendant, but that no agreement was made that what was due on the Note was to be accounted in part payment of the Purchases made of the Defendant:—That in March and August of that year, Payments were made for Goods purchased without any allusion to the Note:—That the whole amount of the Purchases from the Defendant was 122*l.* 9*s.* and that 52*l.* 9*s.* remained

due for which he had brought an Action. Defendant admitted the Plaintiff had told him he had mislaid the Note, but the Defendant considered it as untrue, and that the Note had been destroyed by the Testator.

1821.

HARVEY  
v.  
WOOD.

After the Bill was filed the Note was found, and it was produced in Court.

Mr. *Barber*, under these circumstances, moved, upon Affidavit, to restrain the Defendant from proceeding at Law, insisting, 1st on the parol agreement, that the Note should be considered in part payment of the Goods advanced; and 2dly, that though the Note was due to the Plaintiff in *autre droit*, and incapable of being set off against the Plaintiff's demand at Law, this Court would give effect to it as a set-off; and cited *Lanesborough v. Jones (a)*, and *Jeffs v. Wood (b)*.

Mr. *Bell*, *contra* :—

The Cases cited do not apply. There one Debt in Equity was set off against another equitable Debt. In a late Case before your Honor, *Ranking v. Barnard (c)*, one equitable Debt was allowed to be set off against another of the same nature, but these are both legal Debts, and the same doctrine does not apply.

The VICE-CHANCELLOR :—

In this Case both the Debts are legal, and the Plaintiff can have no relief in Equity without special circumstances. The agreement stated in the Bill is expressly denied by the Answer.

Motion refused.

(a) 1 P. Wms. 325.

(b) 2 P. Wms. 128.

(c) Ante, p. 32.

*In re* GOODMAN.

1820.  
15th Jan.

A COMMISSION of Bankruptcy being about to issue, Mr. *Whitmarsh* was instructed by two principal Creditors, that if he heard an application made that the Commission might be directed to the Solicitors of the place where the commission was to be opened, on the usual Affidavit, he should state, that certain Barristers, residing at no great distance from the place where the Commission was to be opened, had no objection to act under it if directed to them. The Motion was made, and Mr. *Whitmarsh* stated his instructions, whereupon the *Vice-Chancellor* directed, that within a given period an Affidavit must be produced by the petitioning Creditor, that on application made to such Barristers they refused to attend, and that without such Affidavit he would not make the Order, but directed that no other Docket should be allowed to be struck in the mean time.

1821.  
18th Jan.

*Ex parte* MOULE *in re* DARK.

*Attorney in Bankruptcy entitled on petition to have paid to him a fund in Court in part payment of his*

THE Petition stated, that in and for several years before 1814, *Moule* was employed as the Attorney of *Henry Maundrell*, and acted as such, until *Maundrell* was in December 1820, discharged under the Insolvent Debtors Act.

*Bill of Costs at Law, and in Bankruptcy, relative to the claim under which the Money was paid into Court, although his Client, since the Money was paid into Court, had taken advantage of the Insolvent Debtors Act.*

One *Dark*, previously to his Bankruptcy in 1815, held a large farm of *Maundrell* on a lease for twenty-one years, at a rent of 950*l.* and the lease was assigned under the Commission to *Jefferies* and *Hubbert*, as Assignees of *Dark*.

1821.

*Ex parte*  
MOULE  
*in re*  
DARK.

In 1815 the Assignees took possession, but paid no Rent, and refusing to make an election to take the Lease or abandon it, *Maundrell* distrained upon them for the Rent, and presented a Petition, praying, that the Assignees might be directed to make their election (*a*).

The Assignees replevied the Goods distrained, and presented a Petition, praying, that *Maundrell* might be restrained from proceeding in the Replevin, but no relief was given on the Petition, and *Maundrell* was paid the Rent due, and Costs.

The Assignees having again refused to pay the Rent due, viz. that due at Christmas 1817, *Maundrell* again distrained, and several proceedings were had, and *Maundrell* obtained Judgment for a Quarter's Rent, amounting to 273*l.* 10*s.* and 36*l.* Costs.

The two before-mentioned Petitions came on to be heard before the *Vice-Chancellor*, on the 1st of June 1818; and it was ordered, that the Assignees should pay 273*l.* 10*s.* into the Bank, subject to further order; and that the Petition of the Assignees should be dismissed, with Costs to be taxed by a *Master*, to whom several inquiries were referred.

The *Master*, by his Report, 1st July 1820, stated that

(*a*) See ante, 2 vol. p. 315.



1821.

*Ex parte*  
**MOULE**  
*in re*  
**DARK.**

the Assignees after taking the off-going crop from the Farm, and before the 5th November 1817, quitted the possession of the Premises, and tendered the same to the agent of *Maundrell*.

*Maundrell*, on the 27th July 1820, presented a Petition stating the *Master's* Report, and that the sum paid into the Bank was standing in the name of the *Accountant-General*, and praying, that the same might be directed to be paid to him or his Solicitor, and that the Assignees might pay the Costs of that, and the former, Application.

The Petition came on to be heard, but it appearing that *Maundrell* had taken the benefit of the Insolvent Debtors Act, and that no Assignee had been appointed of his Estate and Effects, it was ordered to stand over until the next day of Petitions.

*Salmon* and *Merrewether* were afterwards appointed Assignees of the Estate of *Maundrell*.

The Petitioner *Moule*, as the Solicitor of *Maundrell*, carried on the Proceedings in the before-mentioned matters and in the Replevin Causes, and his Costs amounted to 400*l.* which remained due from *Maundrell*; and he submitted that the sum of 273*l.* 10*s.* standing in the name of the *Accountant-General* of the Court ought to be applied in part discharge of his demand; and the prayer of the Petition was, that the *Master's* Report might be confirmed, and that the *Accountant-General* might be directed to pay the sum of 273*l.* 10*s.* to the Petitioner on account of the said Costs and Charges; and that it might be referred to the *Master* to inquire and state what was due to the Petitioner for business done and Monies expended by him in the matters afore-

said, and in the Proceedings in the replevin Suits, and that if the same should not exceed the sum of 273*l.* 10*s.* that the same might be paid to him in like manner by the *Accountant-General*, together with the Costs of this application.

1821.

*Ex parte*  
MOULE  
*in re*  
DARK.

Mr. Agar for the Petitioner.

Mr. Heald, for the Assignees of *Maundrell*, insisted, that *Moule* ought not to be in any better situation than the other Creditors of *Maundrell*, amongst whom the Money in Court ought to be divided.

The VICE-CHANCELLOR:—

The Lien of the Solicitor upon the Fund in Court, which is the result of the Proceedings, cannot be defeated by the subsequent insolvency of the Client. The Assignees of the insolvent Debtor can only take his Property subject to the claims by which it was affected as against him.

The Assignees must, however, have their Costs, under the special Provisions of the Insolvent Act (*a*).

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PRICE v. LYTTON.

1821.

19th Jan.

AFTER an Examination was closed before the *Master* he admitted further Interrogatories to be brought in, which, by mistake, had not been brought in before.

*The Master may, at his discretion, receive further Interrogatories.*

Mr. Treslove moved, that the Interrogatories might be suppressed, as not being warranted by the practice, and cited the Practical Register (*b*), in which there is

(*a*) 54 Geo. 3, c. 21, s. 13.    (*b*) Page 218, Edit. of 1714.

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PRICE

v.

LYTTON.

the following passage: "A Defendant ordered to be examined to an Account, is examined short; the Plaintiff prays that the Interrogatories may be amended, which the Court denied."

In *Lynn v. Buck* (c) the same question arose, and it was sent back to the *Master*, with an intimation that he should receive the Interrogatories, but a case was there mentioned where the *Lord Chancellor* held they could not be put in without an order for that purpose. He referred also to *Hatch v.* — (d).

Mr. Barber, *contra* :—

In *Lynn v. Buck* the *Master* attended to the intimation of the Court, and admitted the further Interrogatories, and the practice seems now established that the *Master* may, at his discretion, receive further Interrogatories.

The VICE-CHANCELLOR :—

The Decree authorizes the *Master* to examine the Parties upon Interrogatories as he shall think fit; and where he considers further Interrogatories necessary, they are plainly within the scope of his authority.

Motion refused.

(c) Ante, 3 vol. 280.

(d) 19 Ves. 116.

ASBEE and another v. SHIPLEY and others.

1821.

23d Jan.

IT was moved on behalf of the Defendants, and of one *Collins*, who had been examined as a Witness on behalf of the Defendants on the 9th instant, that *Collins* might be at liberty to attend the *Examiner* to be re-examined, upon the same Interrogatories, for the purpose of stating, in addition to his former deposition, certain Facts which the Plaintiff had communicated in a conversation with the Witness; or that a fresh Interrogatory might be exhibited for taking the examination of the Witness, as to such additional Fact, with liberty to the Plaintiffs to cross-examine the Witness thereon; and that the *Examiner* might be at liberty to re-examine him accordingly.

*A Witness omitted to state an additional Fact he intended to state, and which, in a memorandum previous to his Examination, he mentioned he could state. Held, he could not be re-examined, to give him an opportunity of stating such Fact.*

The Motion was supported by an Affidavit of the Witness, in which he stated, that being applied to by the Solicitors of the Defendants, to know if he could give any Evidence relative to the matters in issue in this Cause, he on the 3d of January 1820, stated, in writing, the matters to which he could depose, and which, amongst other matters, stated the Facts for which leave was now sought to add them to the Evidence; and that he was told by the Defendants Solicitor that such Facts were very material:—That on the 9th of January he attended the *Examiner*, and was under examination from half past eleven in the forenoon, until about Three o’Clock in the afternoon, when he finished his examination, and signed the same, and then proceeded to his residence at Stockwell; and that, whilst on his way, a doubt arose in his mind, whether he had related the conversation before mentioned,

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ASBEE  
and another  
v.  
SHIPLEY  
and others.

and which he intended to have formed part of his Evidence; and that he intended on the next day to return to town to satisfy himself on the subject, but was prevented by an accident which befel his Servant, and endangered his life, and on that account it was not until the 11th of January, when he called upon the Defendants' Solicitors, and informed them of his doubt, whether he had not made an omission in his Evidence, whereupon the Witness went with one of the Solicitors to the *Examiner's* Office, and the *Examiner* on referring to the Depositions, said, the Fact had not been stated in the Depositions, but that he could not add to them without an order of the Court:—That the circumstance so omitted in the Deposition, was entirely from mistake and forgetfulness; that he has not directly or indirectly had any communication with the Defendants Solicitors, save as aforesaid, or with any other Persons relating to his Evidence.

One of the Solicitors, by his Affidavit, corroborated the foregoing Affidavit as to the paper writing, containing a statement of the Evidence which the Witness could give, and of the Witness calling on the 11th of January, and stating his doubts as to the Evidence he had given, and the attendance at the *Examiner's* Office. The Plaintiffs Evidence was concluded, and the Cause set down.

Mr. *Bell*, and Mr. *Tinney*, in support of the Motion:—

There are many Cases in which Depositions have been allowed to be amended; they are all, except a late Case, determined by your Honor, brought together in Mr. *Maddock's* Treatise (a). We have not on search

(a) Prin. and Pract. of Chan. vol. 2, p. 414, 2d edit.

## CASES IN CHANCERY.

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found any other. In the Case determined by your Honor you allowed the Witness to correct a mistake, a memorandum being produced, made previous to the examination, which showed how he intended to have given his Evidence.

1821.

ASBEE  
and another  
v.  
SHIPLEY.  
and others.

*Mr. Parker, contra.*

**The VICE-CHANCELLOR:—**

In the Case referred to, following authority, I permitted a Witness to correct his testimony, as to a date, by an existing written document. The present application is not to correct testimony, but to add to the testimony a general fact most material to the very point of the case. I do not know that such an addition to testimony has ever been permitted, and I am unwilling to make a precedent which is so dangerous in principle, whatever my opinion may be as to the particular case.

Motion refused with Costs.

**FRANKLYN v. TUTON.**

1821.

25th Jan.

**THE** Defendant was Lessee from the Plaintiff of certain Building Ground, and covenanted that the House to be built by her should correspond with the adjoining Houses already built, in its Elevation. The Bill was to compel the Defendant, who had not conformed to the Covenant, to alter the Elevation accordingly.

*Equity will execute a Covenant that Lessee's elevation shall correspond with the adjoining Houses.*

The *Vice-Chancellor* decreed according to the prayer of the Bill.

1821.

26th Jan.

FENNER v. TAYLOR.

*A Bill by one of two residuary Legatees, the other being a Defendant. The usual Decree was made, and held, on further directions, that Costs could not be given out of the Fund in Court, as between Solicitor and Client, without the consent of the Defendant.*

**A** Bill was filed by one of two residuary Legatees for the administration of the Estate, the other residuary Legatee being a Defendant, and the usual Decree was made. The cause now came on for further directions upon the Master's Report, and a question was made, whether the Costs of the Plaintiff and Defendant, the residuary Legatees, which were to be paid out of the Fund, should be taxed, as between Solicitor and Client, or as between Party and Party?

Mr. *Hart*, and Mr. *Treslove*, for the Defendant, contended that the Costs should be taxed as between Party and Party, because the extra Costs of the Plaintiff would be much heavier than those of the Defendant.

Mr. *Heald*, and Mr. *Roupell*, for the Plaintiff, insisted, that the Costs ought to be taxed, as between Solicitor and Client, inasmuch as the Defendant had the same benefit from the Suit as the Plaintiff, and the Plaintiff ought not, therefore, to be charged with more Expense.

The *Vice-Chancellor* directed the Case to stand over for inquiry into the practice; and on a subsequent day, stated, that he could not give the Costs out of the Fund in Court, as between Solicitor and Client, without the consent of the Defendant.

GOODMAN v. SAYERS.

1821.

27th Jan.

MR. Sugden moved for a writ of *Ne exeat* to be marked for the amount of certain taxed Costs, on the ground, that on a Bill which had been filed, a Decree was made with Costs, and the Costs had been taxed; and that the Defendant was about to leave the Country and fix his Residence in France before Proceedings could be had to compel the payment of the Costs. He cited, as in point, *Steward v. Steward (a)*.

*A Ne exeat does not lie in respect of Costs taxed in a Chancery Suit.*

The VICE-CHANCELLOR:—

Such an application is certainly new to the Courts here. The writ of *Ne exeat* is granted in support of a Bill filed for an equitable demand, as Bail is required at law in support of an action; and the writ of *Ne exeat* has never been granted to assist the process of contempt by which the payment of Costs is enforced.

Motion refused.

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Lord Viscount MILSINTOWN and another,

*versus*

Earl PORTMORE, Lord MULGRAVE and others.

THE particulars of this Case appear in the Report on the argument of the Demurrers, *ante*, 3 vol. p. 491. A Receiver was appointed in June last, and the Answers being put in, the Cause now came on to be heard.

*Ibid.*

(a) 2 Ball & Bea. 73.



1821.

Lord Viscount  
MILSINTOWN  
and another,  
v.  
Earl PORTMORE  
and others.

The VICE-CHANCELLOR :—

My opinion is, that Lord *Portmore* and the Trustees must procure an immediate Renewal to make up such Term, as would have been subsisting if the Renewals had been regularly made according to the habits of the *Dean and Chapter*.

The plain purpose of the Settlement was, that the Property of this Leasehold House should remain to be enjoyed by those who took after Lord *Portmore*, as it was enjoyed by him, and the Renewals must therefore necessarily be at the Expense of the Party in possession, or, in other words, be a Charge upon the Rents and Profits.

It could not be intended that the Trustees should either have a discretion, whether they would or not renew, or whether they would renew out of Rents and Profits, or by Mortgage. They were appointed for the purpose of protecting future interests, and could not abandon them. The expression, "it should be lawful for them," meant only that it should be lawful for them, as against the Party in possession, and out of his Rents and Profits to pay the Expenses of Renewal; and the authority to mortgage cannot be considered as so given to them, as to leave it to their option whether they would or not destroy the Interests in Remainder, by throwing the charge of the Renewal upon the *corpus* of the Property, but as given to them to advance the declared purposes of the Settlement for the benefit of those in Remainder, and to protect the Property under special circumstances, where the price of Renewal could not be otherwise supplied; and in such cases there would be an equity in this Court to call back from the Party in possession the charges of the Renewal, so as to redeem the estate from the burthen.

1821.

20th Feb.

BRANDON v. BRANDON.

A MOTION was made on behalf of one *Powell*, a Receiver appointed in this Cause, that it might be referred to the *Master* to inquire and state, whether it would be for the interest of the Parties interested in the Rents and Profits of the Testator's Estates, that the Receiver should be at liberty to make Distresses, or to take any other Proceedings against the Tenants in arrear; and that in case the *Master* should be of opinion that it would, then that the Receiver might be at liberty to make such Distresses, or take such other Proceedings in the name of the Trustees; and that the Expenses attending the same, might be allowed him in his Accounts.

*Receiver may  
distrain without  
applying to the  
Court.*

Mr. *Roupell*, in support of the motion:—

The Receiver wishes for the sanction of the Court before he proceeds against the Tenants, especially as he must distrain in the name of the Trustees who have the legal Estate. The effect of a Distress may be to ruin the Tenant. The Tenant besides may replevy, and occasion considerable Expense. He cited *Hughes v. Hughes* (a), *Pitt v. Snowden* (b), *Shelly v. Pelham* (c), and *Mitchell v. Duke of Manchester* (d).

The VICE-CHANCELLOR:—

The Registrar states that the practice is for a Receiver to distrain upon his own discretion for Rent in arrear within the year; but if in arrear for more than a year, then an Order is necessary.

(a) 3 Bro. C. C. 86; S. C.  
1 Ves. jun. 161.  
(b) 3 Atk. 752.

(c) 1 Dick. 120.  
(d) 2 Dick. 787.

1821.  
21st Feb.

## CLARKE v. DUNN and PHELPS.

*If one of two Defendants sets down a Cause, he is only to serve the Plaintiff with a Subpœna to hear Judgment.*

ON the coming on of this Cause the Defendant *Phelps* did not appear. The Defendant, *Dunn*, had set down the Cause, and served a Subpœna to hear Judgment on the Plaintiff, but not on his Co-Defendant, *Phelps*; and the question was, whether he ought not to have served a Subpœna to hear Judgment on *Phelps*?

Mr. *Heald* said, three of the Clerks in Court were of one opinion, and three of another, and it was thought to be an undecided point.

Mr. *Hart*, and Mr. *Treslove*, contended it was not necessary to serve the Subpœna on the Co-Defendant.

The *Vice-Chancellor* directed the Case to stand over for inquiry into the practice.

On a subsequent day, the *Vice-Chancellor* stated that it had been certified to him by the Registrar, that it was only necessary for a Defendant, setting down a Cause, to serve the Plaintiff; and that it was the duty of the Plaintiff to serve the Subpœna to hear Judgment on the other Defendant.

THOMAS NORRISH v. MARY MARSHALL, Widow,  
since deceased, and THOMAS MARSHALL.

1821.  
21st and 22d  
Feb.

BY Indenture 31st January 1800, between the Plaintiff and *Benjamin Roper*, his Trustee, of the first part, and *James Collins* of the other part; the Plaintiff and *Roper* demised certain Premises to *Collins*, his Executors, &c. for the term of one thousand years, with a proviso, that if the Plaintiff should replace and transfer at a day since past, to *Collins*, his Executors, &c. the sum of 1,000*l.* five per cents., (which had been sold out by *Collins*, and the produce paid to the Plaintiff), and Interest in the mean time at five per cent., payable half-yearly, then the Term was to cease. On the execution of this Deed, the Plaintiff delivered to *Collins* all the Title Deeds relating to the mortgaged Premises. The Stock was not retransferred at the time appointed, but the Plaintiff afterwards fully accounted with *Collins*, and paid off the Mortgage, and on the 30th October 1818, *Collins*, at the request of the Plaintiff, and to keep the Term on foot, conveyed the same to one *Andrew Hewson*, (a Trustee for the Plaintiff), to hold to him, his Executors, &c. for the residue of the Term. At the time of this Conveyance the Plaintiff desired to have the Title Deeds delivered up, but *Collins* stated they had been delivered by him to a Mr. *John Marshall*, and that the same were in the hands of *Mary Marshall*, his Widow and Administratrix, and of *Thomas Marshall* the son of *John Marshall*. On application to *Mary* and *Thomas Marshall* for the Title Deeds, they claimed a right to the same,

N. mortgaged to C. to secure 1,000*l.*; C. assigned the Mortgage to M. to secure 700*l.*; but no notice of the Assignment was given to N.

Held, on a Bill by N. against M. to have the mortgaged Deeds delivered up,

1. That C. was not a necessary Party, as he had been examined as a Witness, and admitted that N. had paid him his Mortgage Money.

2. That delivery of Goods to C. by N. was a valid discharge of the Mortgage Debt, and was a good Payment against M.; but,

3. An Account was directed what part of Mortgage Money was paid, as C.'s Evidence, from his conduct, could not be admitted as a sufficient Proof.

1821.

NORRISH  
v.  
MARSHALL  
and another.

under a Deed Poll dated in 18th July 1812, in which the Indenture of Mortgage of the 31st January 1800 was recited, and that the same remained due and owing; and by the said Deed Poll it was declared, that *Collins* should from thenceforth stand possessed of the mortgaged Premises, upon trust to permit the said *John Marshall* (who, together with *Mary* his Wife, had advanced 700*l.* to *Collins*) to receive and take the Interest of 700*l.* during his life, and after his decease to pay the Interest to *Mary* his Wife during her life, and after her decease to pay the 700*l.*, and all Interest due thereon, to *Thomas Marshall* the Son, &c.

The Bill, stating these facts, further stated, that if the last-mentioned Deed was really executed, and the Consideration paid, yet that the greater part of the original Mortgage had been satisfied before the Deed Poll was executed, and that the remainder was paid by the Plaintiff before he had any knowledge of the Deed Poll.

The prayer of the Bill was, that the Defendants might be decreed to deliver up to the Plaintiff all the Title Deeds relating to the mortgaged Premises, and that in the mean time, they might be restrained by injunction, from pledging or depositing, or parting with the same.

The Defendant, *Thomas Marshall*, by his Answer admitted the Deed Poll, and stated a Bond was also given by *Collins* as a further Security, and that *Collins* at the time of the execution thereof was the Attorney and Solicitor of the Plaintiff, and that *Collins* undertook to inform the Plaintiff of the Deed Poll, and admitted that the Title Deeds were delivered up on the execution of the Deed Poll, and submitted that he was entitled to

retain the Title Deeds until the 700*l.* and Interest were satisfied.

1821.

NORRIS

v.

MARSHALL  
and another.

On the part of the Plaintiff, the original Mortgage was proved, and *Collins* was examined, who stated the original Mortgage had been paid off by the Plaintiff in Money and Wines, the particulars of which were set forth in a Schedule annexed to his Examination; and that previous to his Mortgage being paid off, he gave no notice to the Plaintiff of the Deed Poll, and that he never undertook to give such notice. The death of *Mary Marshall* was also proved.

On the part of the Defendant, *Collins* was cross-examined, and stated, that in July 1812, and before and after, he was usually and generally, and upon divers occasions, employed by the Plaintiff as his Attorney and Solicitor, and in the management of his affairs; and that the last Charge made by the Plaintiff against the Defendant for goods delivered to him, was in September 1818; and that he never informed *John Marshall* or his Wife, that the original Mortgage was satisfied, as he meant to repay the 700*l.* without making the Plaintiff privy to the circumstances, and that for the same reason he had never acquainted the Plaintiff with the Deed Poll.

*Hewson*, the partner of *Collins*, was also cross-examined, and stated, that before, in, and after, July 1812, the Plaintiff usually employed *Collins* and the Witness in transacting business for him as Attornies and Solicitors, and in the management of his affairs; and he further stated, that the original Mortgage was paid off by the Plaintiff (who is a wine and brandy Merchant), by supplying *Collins* with Wines and Spirits, and by

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receiving a Sum of 32*l.* and upwards, as a debt due to the Plaintiff; and that to the best of his belief, the last Charge for goods delivered to *Collins* was in September 1818. He further stated, that in September 1818, he informed the Plaintiff that *Collins* was insolvent, and that he was alarmed, and asked what were become of the Deeds, and said that by supplying *Collins* with Wines, he had more than satisfied the Principal and Interest due on the Mortgage to *Collins*.

On the opening of the Case, an objection was taken that *Collins* ought to have been made a Party to the Suit. On the part of the Plaintiff it was contended, that he was not a necessary Party, for *Collins* is examined and cross-examined as a Witness, and he states his Mortgage was satisfied. *Hill v. Adams* (a), and *Chambers v. Goldwin* (b), were cited. On the other hand it was urged, that the Defendant denied the original Mortgage was satisfied, and that *Collins* had acted so improperly, that his testimony could not be credited; that in the Cases cited, the Mortgage was wholly assigned, but that here it was only partially assigned, the original Mortgage being for 1,000*l.* and the Deed Poll being only to secure 700*l.*; that *Collins* might make some claim, and that to prevent multiplicity of Suits, it was necessary all Parties interested should be made Parties, and that *Collins* therefore was a necessary Party.

Mr. *Horne*, and Mr. *Pemberton*, for the Plaintiffs.

Mr. *Wetherell*, and Mr. *J. Wilson*, for the Defendants.

The VICE-CHANCELLOR :—

Where a Mortgagee assigns the whole benefit of his Security, he is no necessary party to a Bill for redemp-

(a) 2 Atk. 39.

(b) Ves. 254.

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tion, for he has no longer any interest in the subject. But where he assigns, as in this case, only a part of the benefit of the Security, his interest in the subject continues; and he is, generally speaking, a necessary party. In this case, however, he has been examined as a Witness for the Plaintiff, and swears that he has been fully paid, and has no longer any interest in the subject; and I will therefore permit this Cause to proceed without him.

The Cause was now argued on the merits for the *Plaintiffs*.

The Plaintiff having paid off the Mortgage is entitled to have his Title Deeds delivered up by the Defendant. The subsequent Mortgage to *Marshall* and Wife was not with the privity of the Plaintiff, he had no knowledge of it, until he had discharged the Mortgage. *Marshall* and Wife should have communicated their Mortgage to the Plaintiff; if they had done so, payments made by the Plaintiff to *Collins* after such notice, would have been unwarranted; but, a Mortgagor, until notice of an Assignment by the Mortgagee, may deal with the Mortgagor, as if no such Assignment had been made, and the Assignee takes, subject to all the equities as between the Mortgagor and Mortgagee; *Matthews v. Walwyn* (c), *Williams v. Sorrell* (d), and what is said in *Chambers v. Goldwin* (e), are authorities to that effect. The Defendants have no equity entitling them to retain the Title Deeds; their loss is attributable to their neglect in not giving notice of the Assignment to them.

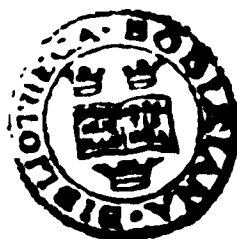
(c) 4 Ves. 389.

(d) Ibid.

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(e) 9 Ves. 264.

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For the *Defendants*.

This is a case of novelty; it is certainly too late to contend that an Assignee of a Mortgagee, without notice to the Mortgagor, does not take subject to the equities between the Mortgagor and original Mortgagee, but this case is peculiarly circumstanced. *Collins* was the Attorney of the Plaintiff before, at, and after, the period, when the Defendant's Mortgage was made. A dealing with *Collins* therefore must be considered as a dealing with the Plaintiff, whose Attorney he was, and the Plaintiff must be taken to have had notice of the Defendant's deed. It is not pretended that any account was settled between the Plaintiff and *Collins*, previous to the Defendant's Mortgage. If the Plaintiff had in any way reduced the amount of the Mortgage money due to *Collins*, there was no indorsement to that effect on the Mortgage-deed. In 1812, when *Marshall's* Mortgage was executed, there was not more than 260*l.* due from *Collins* in respect of wines sold to him. No case, no principle, establishes that, if a Mortgage be made of real Estate, and the Mortgage is assigned, though without notice to the Mortgagor, that the Mortgagee can, as against the Assignee of the Mortgage, say, "by collateral dealings, I have discharged my Mortgage debt." If *Collins* had filed a Bill to foreclose, the Plaintiff might have said, "your Mortgage is discharged by the goods I have sold you;" but he cannot say so to an Assignee of the Mortgage. Is any possible claim a Mortgagor may have against a Mortgagee to be set off against an Assignee of the Mortgage? Suppose an action for damages, and a verdict. Is that to be set off against an Assignee of the Mortgage? An advance of money might be set off, but a sale of goods, it is apprehended, cannot be set off as against an Assignee of the Mortgage. Is the Assignee of a Mortgage not merely to

ask the Mortgagor whether the Mortgage is paid off, but whether there are any outstanding accounts and dealings between them? The account referred to by *Collins* in his deposition is not satisfactory. If the Court should think that goods delivered to *Collins* operates as against the Assignee of the Mortgage in reduction of the Mortgage-debt, an account should be taken of the goods delivered, and it should be ascertained whether the Mortgage was really discharged in that manner.

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The VICE-CHANCELLOR:—

This case is singular in its circumstances; the general principle, that an Assignee of a Mortgage, without notice to the Mortgagor, is bound by the equities between the Mortgagor and the original Mortgagee, is not disputed. It is argued, that *Collins* being the Attorney of the Plaintiff, it is to be considered that the Plaintiff had constructive notice of the assignment of the Mortgage to *Marshall*, but in the assignment of the Mortgage, *Collins* acted, not as the Attorney or Agent of the Plaintiff, but in his own individual character of Mortgagee. It is next said, that the Mortgage is taken to have been satisfied, not by direct payment made in that respect, but by the balance of a general account, partly composed by the supply of goods, and, that though the Assignee of a Mortgage may be affected by direct payments made to the Assignee on account of the Mortgage, he is not to be affected by the balance of a general account so composed. The principle is, that as against an Assignee without notice, the Mortgagor has the same rights as he has against the Mortgagee, and whatever he can claim in the way of set-off, or mutual credit, as against the Mortgagee, he can claim equally against the Assignee. The remaining

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question is, whether I am to conclude the Defendant, by the evidence of *Collins*, as to the fact that the Plaintiff has fully satisfied the original Mortgage-debt, and under the circumstances of this case I think I ought not so to conclude him. Let it be referred to the *Master* to inquire whether *Collins* had fully paid or satisfied the Mortgage debt when the Plaintiff had first notice of the Assignment made by *Collins* to the Defendant, and let the *Master* be at liberty to state any circumstances specially, at the request of either party; and reserve the consideration of further directions and Costs until after the *Master* shall have made his report.

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RICHARD COOPER - - - - - Plaintiff;  
and  
CHARLES WYATT and others - Defendants.

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*Bequest to Trustees in trust to pay C. H. an Annuity during his Life, provided that if C. H. should by any ways or means whatsoever sell, dispose of, or encumber the right, &c. he might have for Life, then his Interest to cease, and the*

*CHRISTOPHER HERBERT*, by his Will, amongst other Bequests, gave and devised all and singular his Messuages, Cottages, Closes, Lands, Tenements, Hereditaments and real Estate whatsoever, situate, &c. unto *Richard Bignell* and *Charles Wyatt*, their Heirs and Assigns, upon the Trusts in and by said Will expressed in favour of Testator's Nephew, *Richard*, and his Children, as to one undivided Moiety of the said Estates; and as for, to, and concerning the other undivided Moiety of all his said Estates, upon Trust that the said *Richard Bignell* and *Charles Wyatt*, and the Survivor of them, his Heirs and Assigns, should, and did, for and during

*Trustees to apply the same for the benefit of his Children. Held, that on the Bankruptcy of C. H. his Interest ceased, and his Children became entitled.*

the term of the natural Life of his said Testator's Nephew, said *Samuel Herbert*, receive and take the Rents, Issues and Profits of said last-mentioned Moiety, and from time to time pay, apply and dispose of the same, or such part or parts thereof as they in their discretion should think proper, for and towards the maintenance, education and bringing up of all and every, or such one or more of the Child or Children of his said Testator's Nephew, said *Samuel*, in such parts and proportions, manner and form as they in their discretion should think proper; and in case there should be any overplus of the said Rents, Issues and Profits from and after such application as aforesaid, then upon trust from time to time to pay and deliver such overplus into the hands of the said Testator's said Nephew, said *Samuel*, but not to his Assigns, for and during the term of his natural Life, to and for his own sole use and benefit, and from and immediately after the decease of the said Testator's Nephew, *Samuel*, then upon this further trust and confidence that they, said *Richard Bignell* and Defendant *Charles Wyatt*, and their Heirs, did and should stand seised of the said last-mentioned Moiety of all his Estates, in trust for all and every the Child and Children of his the said Testator's said Nephew, *Samuel*, which should be living at the time of his the said *Samuel's* decease, his her and their Heirs, if more than one, share and share alike as Tenants in Common, and not as joint Tenants; and in case any of his Lands in *Chacombe* aforesaid, should appear to be Leasehold, he, said Testator, gave and bequeathed the same to said *Richard Bignell* and Defendant *Charles Wyatt*, their Executors and Administrators, upon trust, that they should stand possessed of the same in two equal Moieties, to for and upon such trusts as he the said Testator had before declared, concerning the Moieties of real Estate

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respectively, or as near thereto as the law of this realm would permit, provided, and his Will was, that if his said Nephews, or either of them, should by any ways or means whatsoever, sell, dispose of, or encumber the right, benefit or advantage he might have for Life by the now stating Will, or any part thereof; then the said Testator's Will was, that the right, benefit and advantage of his said Nephew for Life, or such one of them as should so act, should cease and determine as to him or them, and be applied for the benefit of his or their Child and Children respectively, in such manner as his said Trustees should think proper; and the said Testator's Will was, and he did direct the said *Richard Bignell* and Defendant *Charles Wyatt*, and their Heirs, to pay, apply and dispose of the Rents of his said real Estates, in such manner as they should think proper, in the minority of any Person or Persons who by his Will should be entitled to the same, to and for the benefit of such Person or Persons respectively; and after divers personal Legacies to the respective Persons in said Will named, it was further thereby provided, that in case both or either of his said Nephews should depart this life, leaving no Issue living at the time of his or their death, then the Moieties or Moiety devised for the benefit of him or them so dying, or his or their Children, should descend to his (the Testator's) own right Heirs. The Testator appointed *Richard Bignell* and the Defendant *Charles Wyatt*, joint Executors of his Will.

The Testator died in 1789. On the 10th November 1814, a Commission of Bankruptcy issued against *Samuel Herbert*, the Nephew of the Testator, under which he was declared a Bankrupt; and one *Richard Herbert*, since deceased, and the Plaintiff, were chosen Assignees, and the usual Assignment was made to them. On the

4th August 1818, the Bankrupt's Certificate was allowed.

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At the time of the Bankruptcy of *Samuel Herbert* there were, and still are, seven Children living, who have attained twenty-one years.

The Bill prayed on behalf of the Plaintiff, the Assignee of *Samuel Herbert*, that the Trusts of the Will might be performed, and the rights of the Plaintiff as such Assignee declared, and that *Wyatt* might be declared a Trustee for the Plaintiff, as such Assignee, and for the usual accounts.

The question was, whether, on the Bankruptcy of the Testator's Nephew, *Samuel Herbert*, the Rents of a Moiety of the Testator's Estate passed to *Herbert's* Children, under the Clause in the Will providing that he should not sell, encumber or dispose of his Estate for Life, or whether his Assignee under the Commission was entitled to the same?

Mr. *Bell*, and Mr. *Twiss*, in support of the Bill:—

The proviso in the Will, that he shall not sell, encumber or dispose of his Interest, does not extend to an Assignment under a Commission of Bankruptcy, it not being expressly mentioned, nor any gift over in that event. Lord *Kenyon* held in *Doe* on dem. *Mitchenson v. Carter* (a), that a Lease taken in Execution was not to be considered as an alienation of the Party against whom the Execution issued; and in the *King v. Robinson* (b), where very large words were used to prevent an alienation in any

(a) 8 Term Rep. 57.

(b) Wightw. 386.

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manner, it was held that the Outlawry of the Annuitant did not determine the Annuity. At law, it has been frequently held as between Lessor and Lessee, that a provision against an Assignment without leave, is not infringed by the Assignment in Bankruptcy (c). To prevent an Estate passing in the event of Bankruptcy there must be express words for that purpose, the Court being always anxious to protect the claim of Creditors. The Assignment meant by the Testator was a voluntary act of *Herbert*, an Assignment by himself, not an Assignment by operation of law, as in the case of Bankruptcy. In *Dommett v. Bedford* (d), the decision went farther than any of the preceding Cases; the words, however, in that Case, were different from this, and more comprehensive. The words there were, "as to the Annuity given to *Bedford Woodham*, that the same should be paid to him only, and that a Receipt under his own hand and no other should be a sufficient discharge for the payment thereof; his intent being that the said Annuity, or any part thereof, shall not on any account be alienated for the whole term of his Life, or for any part of the said Term; and if the same shall be so alienated, the said Annuity shall thereupon cease and determine." The words "shall not on any account be alienated," were very comprehensive, and may be supposed to have been used in contemplation of possible Bankruptcy; no such words are used in this Case. When the Case came back upon the Certificate of the Judges, the *Master of the Rolls* said, "it was a very doubtful point," and dismissed the Bill without Costs. In *Shee v. Hale* (e),

(c) *Goring v. Warner*,  
2 Eq. Abr. 200; *Doe* on dem.  
*Stanhops v. Skeggs*, cited 2d  
Term Rep. 134 and 138.

(d) 3 Ves. 149; S. C. on  
an Issue, 6 Term Rep. 684.  
(e) 13 Ves. 404.

an Annuity was given to *John Mootham* during his Life, with a restriction as to parting with the same, in very comprehensive words, and in that event giving it over; and it was held to cease by his taking the benefit of the Insolvent Debtor's Act; the taking the benefit of the Act being a voluntary act of his own. The *Master of the Rolls* says, in that case, "it appears to me the Son has done an act within this Will to authorize or empower others to receive his Annuity. This differs from the case of the Bankrupt. The Bankrupt had not done any thing. The Insolvent Debtor was not in a situation to be compelled to part with his Annuity, he might have enjoyed it for his life. The signing the Petition and Schedule appear to me to be clear acts." The *Master of the Rolls* appears to have thought that Bankruptcy, even under the very large words in that case, would not have been an alienation under the restrictive Clause. Can it be said that a mere act of Bankruptcy, though not followed by a Commission, would have been an alienation? In *Wilkinson v. Wilkinson* (f), there was a Proviso against alienation, and on the hearing of the Cause, the *Master* was directed to inquire whether the Defendant, *Wilkinson*, had charged or encumbered the Life Estate and Provision made for him by the Will, so as not to be entitled to the personal receipt and enjoyment thereof, using the restrictive words in the Will. The *Master* reported, that he had done so by becoming Bankrupt. An exception was taken to his Report, and it was referred back to the *Master* to review his Report, and to receive further evidence. The *Master of the Rolls*, therefore, was of the same opinion in that case, as he had expressed in *Shee v. Hale*. When the Case came on again before the present *Master of the*

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(f) Coop. C. C. 259.



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*Rolls* (g), for further directions upon the *Master's* reviewed Report, which stated, that by the various acts specified in the Report, (the execution of a Deed of Trust, a Power of Attorney, and a Mortgage or Agreement by *Wilkinson*), that *Wilkinson* had assigned and disposed of, and otherwise charged his real Estate, so as not to be entitled to the personal receipt, use and enjoyment thereof; but the Bankruptcy was not mentioned in such reviewed Report, and the *Master of the Rolls* held that *Wilkinson's* acts were such, that all his interest had ceased. In the argument, the Bankruptcy of *Wilkinson* was adverted to, but the *Master of the Rolls* said, "I am surprised that the subject of the Bankruptcy should have been alluded to in this argument; it is not mentioned in the second Report, and the point respecting it was decided by the late *Master of the Rolls*." Here therefore is an express decision by the late *Master of the Rolls*, that Bankruptcy is not an alienation within words in a Will against alienation in the most comprehensive terms short of the mention of Bankruptcy. Nothing but an express mention of Bankruptcy, as an event in which the Property is to go over, will have that effect, and disappoint the claims of Creditors.

Mr. *Horne*, and Mr. *Tinney*, contra:—

We say there has been an alienation within the meaning of the proviso in this Will. The intent of the Testator is clear. He clearly meant that the Children of his Nephew should take, whether the alienation of the Father were voluntary or involuntary. He meant, that so long as he could receive the Annuity he should have it; but when that could not be, that his Children should

have it. *Dommett v. Bedford* is in point. In the argument of that Case on the issue sent to the Court of *King's Bench* all the Cases were considered, and the Court held that the Annuity ceased in consequence of the Bankruptcy; in effect determining that Bankruptcy was an alienation.

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In *Brandon v. Robinson* (*h*), a Trust by Will was created to pay certain Dividends from time to time into the hands of *T. G.*, or on his proper order and receipt, subscribed with his own hand, to the intent that the same should not be grantable, transferable, or otherwise assignable by way of anticipation of any unreceived payment or any part thereof; and on his decease, the Principal, together with the Dividends, Interest and Produce thereof, were directed to be applied by his Trustees unto and amongst such Person or Persons, as in a course of administration would become entitled to any personal Estate of *T. G.*, and as if the same had been personal Estate belonging to him, and he had died intestate. It was held that *T. G.* took a Life Interest in the Dividends assignable under a Commission of Bankruptcy against him, with a limitation over of the Principal to those who would have been entitled under the Statute of Distributions.

The VICE-CHANCELLOR:—

The true inquiry in this Case is, whether by the expressions used in this Will it can be collected to have been the intention of this Testator that the Estate should determine as to the Nephew in the event of his Bankruptcy. Here is no gift to the Nephew other than a direction that the payment shall be made into his.

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(*h*) 18 Ves. 429; 1 Rose, 197.

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proper hands, but not to his Assigns, and for his own use and benefit; which expressions naturally import an intention of personal enjoyment by the Nephew, and the exclusion of all who attempt to claim through him, and in this sense the words "his Assigns" will as well comprehend the Assignees by operation of law as the Assignees by his own act.

The words of the Proviso, if considered alone, are very large, "If by any ways or means whatsoever he shall sell, dispose of, or encumber the right, benefit or advantage he may have for life, or any part thereof." It is no strain to consider his Bankruptcy as a way or mean by which his interest in this property is disposed of; but this Proviso is best construed by reference to the previous direction of payment, because the purpose of this Proviso is merely to direct the application of the Rents and Profits when they can no longer be paid into the proper hands of the Nephew, and for his own use and benefit. We may, therefore, read the Proviso thus—when my said Nephew shall by any ways or means sell, dispose of, or encumber the right, benefit or advantage given to him by this Will, by which I mean, when the Rents and Profits can no longer be paid into the proper hands of my said Nephew for his own use and benefit, according to my previous direction, then such right, benefit or advantage shall cease and determine as to him, and be applied for the benefit of his Children.—Upon the whole, therefore, I think that the true construction of this Will is, that the Testator did intend that the interest of the Nephew should cease whenever it could no longer be the subject of his immediate personal enjoyment, and that it did not vest in the Assignees under his Bankruptcy.

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THE Will of *Thomas Marvin* was thus:—"I give and bequeath unto my Daughter *Charlotte*, Wife of *James Abbott*, of, &c. the sum of 200*l.* to and for her own use and benefit," and the Testator gave a further sum of Money, and the rent of a House to Trustees, and directed them to stand possessed thereof for the benefit of the said *Charlotte Abbott* and her Children; and that the same should not be subject to the debts, engagements, or in any manner under the control of her Husband.

*Legacy to a Married Woman, "to and for her own use and benefit," does not give a separate Estate.*

In August 1818, a Commission of Bankruptcy issued against *James Abbott*, and his Assignees claimed by the present Bill the 200*l.* Legacy.

Mr. *Bell*, for the Plaintiffs, contended this was not a separate Estate, and cited as in point *Wills v. Sayers* (a).

Mr. *Shadwell* for the Defendants, the Wife and Children, cited a case in 7 Vin. 95, which is there stated thus, "*J. S.* by Will gives to his Daughter *A.* then Wife of one *Beavis*, his Gold Watch, Jewels, China and Household Goods, to be at her disposal, and to do therewith as she shall think fit. The Testator died. *Beavis* became a Bankrupt, and it was contended this was a Devise to the separate use of the Wife, and not assignable by the Commissioners of the Bankrupt. A Case was cited as before Lord Chancellor *Cowper*, viz. a Devise to a Feme Covert for her use and benefit, and held, that because it was not for her separate use, but

(a) Ante, 4 vol. 409.

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only for her use and benefit, it was the Husband's; but the *Master of the Rolls* said he was very much dissatisfied with that determination, and here the intent appears to give it to the separate use of the Wife, and a married woman could not have, &c. to her own disposal, if in the power of her Husband, and the things were proper for her separate use, and decreed for the Wife." MS. Rep. 1733, at the Rolls, *Kirk v. Paulin*. He mentioned also *Jones v.* ——— noticed in *Lumb v. Milnes (b)*, and *Johnes v. Lockart*, cited in *ex parte Ray (c)*.

Mr. *Heald* and Mr. *Combe*, for the Defendants, the Trustees.

#### THE VICE-CHANCELLOR

Held clearly that this could not be considered as a gift to the separate use of the Wife, and referred to the Case of *Wills v. Sayers (d)*, as being in point; and directed a reference to the *Master* to consider of a proper settlement on the Wife and Children, and the Costs to be paid out of the Testator's Estate.

(b) 5 Ves. 520.

(c) Ante, 1 vol. 206. The mistake in the statement of

that Case is noticed, ante, 4 vol. p. 410, in note (c).

(d) Ante, 4 vol. p. 409.

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2d March.

BANKS and others v. SCOTT and others.

*W. F. Scott, Lucas Nicholson, and George Smith, (all since dead) carried on business as Bankers in copartnership. W. F. Scott sharing five twelfths of the profits and losses, L. Nicholson two twelfths, and G. Smith five twelfths. On the 20th January 1812, a Commission of Bankrupt issued against the firm, and the Plaintiffs were chosen Assignees.*

*Scott, Nicholson & Smith carried on business as Bankers in partnership, and were interested in the profits and losses of such banking*

The joint Debts being greater in amount than the joint Effects, the Plaintiffs sold the separate Estates of the Bankrupts, for satisfaction of the joint Debts, after payment thereof of the separate Debts of the Bankrupts. The separate real Estate of *W. F. Scott* produced, after payment of his separate Debts, the sum of 64,040*l.* 12*s.* 1*d.* his separate personal Estate 3,298*l.* 10*s.* 6*d.* making together 67,339*l.* 2*s.* 7*d.* which Plaintiffs received and carried over to the account of the Bankrupts joint Estate. The separate real Estate of *L. Nicholson* produced the sum of 13,214*l.* 11*s.* 5*d.* his separate personal Estate 13,701*l.* 18*s.* 3*d.* making

*concerns respectively, as follows: Scott for five twelfths, Nicholson for two twelfths, and Smith for five twelfth parts.*

*On the 20th January 1812, a Commission of Bankrupt was awarded against them, but the full amount of the joint and separate*

*debts of said Bankrupts with interest was paid. To complete such payment, real Estates of great value belonging to the Bankrupt, Scott, were sold by the Assignees, and on the whole, the said Bankrupt contributed upwards of 46,000*l.* beyond his proportionate share of the losses of the Firm. Part of said Estates were sold during the life of the Bankrupt, Scott; part were contracted to be sold, but not sold at the time of his death, and the remainder were sold since his death, and a surplus remained in the hands of the Assignees. Held, that the Heir of Scott, as such, had no claim in respect of the Estates of the Bankrupt, Scott, sold in his lifetime, the same being converted out and out, and the produce must be taken as it is found; but that the surplus monies in the hands of the Plaintiff, to the amount of the produce of the Estate sold after the death of Scott, the Bankrupt, belonged to the Heir at Law, with four per cent. interest, unless Rents and Profits were claimed.*

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together 26,916*l.* 9*s.* 8*d.* which was received by the Plaintiff, and thereout they first paid his separate Debts, proved under the Commission amounting to 14,361*l.* 7*s.* 3*d.* and after payment thereof, and of Interest to his separate Creditors, and a balance in the Bank ledger of 2,509*l.* 1*s.* 1*d.* the surplus, amounting to 9,521*l.* 3*s.* 1*d.*, was carried over to the account of the Bankrupt's joint Estate. The separate real Estate of *G. Smith* sold for 2,596*l.* 7*s.* his separate personal Estate for 139*l.* 12*s.* 10*d.* making together 2,735*l.* 19*s.* 10*d.* which, after payment of his separate Debts, proved under the Commission, amounting to 811*l.* 18*s.* 9*d.* left a surplus of 1,924*l.* 1*s.* 1*d.* which was carried to the account of the joint Estates of the Bankrupt.

The joint and separate Creditors were paid the whole amount of their respective Debts, and by virtue of an order made for that purpose in the Bankruptcy, on the first of August 1818, such of the joint and separate Creditors, whose Debts carried interest, were paid interest on such Debts from the date of the Commission to the time of such payments of interest respectively, and there remained a balance of 15,204*l.* 11*s.* 1*d.* standing to the account of the joint Estate of the Bankrupts, being the residue of the monies collected by the Plaintiffs, as Assignees, on account of the joint Estates of the Bankrupts, and of the surplus of the Monies carried from the respective separate Estates of the Bankrupts to the joint account of the said Bankrupts, and which had arisen, in a great measure, by considerable sums of Money, which, since the death of *W. F. Scott*, had been received by the Plaintiffs in respect of Debts owing to the firm.

Upon the accounts as they stood between the Part-

ners, the amount of the separate Estate of *William F. Scott*, applied in discharge of the joint Debts, amounted to 70,650*l.* 5*s.* 4*d.*; the separate Estate of *L. Nicholson*, so applied, amounted to 9,521*l.* 3*s.* 1*d.* and the separate Estate of *G. Smith*, so applied, was 11,303*l.* 7*s.* 7*d.* so that *W. F. Scott* contributed considerably more out of his separate Estate to the liquidation of the joint Debts, than his share in the Partnership called upon him to contribute, and the other Partners much less.

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*W. F. Scott* died on the 27th March 1813, intestate, leaving the Defendant, *W. L. F. Scott*, his eldest Son and Heir at Law, and three other younger Sons, viz. the Defendant *Thomas Fenton Scott*, and *Charles J. Scott*, and *Henry Scott*, and also a Daughter *Ann Thomas Fenton Scott*. The eldest Son took out Letters of Administration.

On the 26th November 1813, *G. Smith* died intestate, and the Defendant *William Smith* administered to his Effects.

On the 29th July 1819, *Lucas Nicholson* died, and the Defendant *James Nicholson* took out Letters of Administration.

Previous to the death of *William F. Scott*, only part of his separate real Estate was sold, and the Purchases completed produced 20,000*l.* Another part was agreed to be sold to the amount of 38,000*l.* and Deposits were made by the Purchasers in the life-time of *W. F. Scott*, but the Conveyances were not completed, and the remainder of the Purchase Money paid, until after his death; and at his death, the remainder of his separate



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real Estate remained unsold, and after the Plaintiffs contracted to sell the same for 9,645*l.* which Contracts were afterwards completed, and the Money received by the Plaintiffs.

All the real Estate of *George Smith* was sold by the Plaintiffs, and the Purchase-money received in his lifetime by the Plaintiffs; and all the real Estate of *L. Nicholson* was sold, and the Purchase-money paid in his lifetime, except a small part which was sold after his death, the Purchase-money for which remained unpaid.

All the Estates of the several Partners, so sold, were sold prior to the final Dividend.

The *prayer* of the Bill was, that the Rights and Interests of the several Defendants to and in the Surplus remaining in the hands of the Plaintiffs, and any further Monies to be collected by, or yet to come to the hands of, the Plaintiffs as Assignees, might be declared by the Court.

The Defendant *W. F. Scott*, by his Answer insisted, that as the Heir at Law and personal Representative of *W. F. Scott*, he was entitled to the whole Balance or Surplus as against the said *James Nicholson* and *William Smith*, the Heirs at Law and personal Representatives of *Lucas Nicholson* and *George Smith*; and he and *Thomas F. Scott* for that purpose insisted, that the excess which the said *William F. Scott* contributed, as mentioned in the Bill, out of his separate Property to the liquidation of the joint Debts, beyond his due proportion of five twelfth parts or shares, ought to be repaid to the Estate of *William F. Scott*, out of the Monies so remaining in the

hands of the Plaintiff as Assignees; and any further Monies which might be paid, or be coming to the joint Estate of the Bankrupts, that is to say, the Estate of the said *W. F. Scott*, ought first to receive out of such Monies such a sum of Money as should appear to be the excess of his contributions beyond what the said *W. F. Scott* ought to have contributed with reference to the actual contribution of the said *Lucas Nicholson*; and if after such payment to the Estate of *William F. Scott* there should remain a Surplus, then the Estate of the said *William F. Scott* and the said *Lucas Nicholson* respectively, ought to receive out of such Surplus such sums of Money respectively, as should appear to be the excesses of their contributions respectively, beyond what the said *W. F. Scott* and *Lucas Nicholson* respectively ought to have contributed with reference to the actual contribution of the said *George Smith*; and if after such payments to the Estates of the said *W. F. Scott* and the said *Lucas Nicholson* respectively, there should remain a Surplus, that in such case the Estate of the said *W. F. Scott*, and the Estate of the said *Lucas Nicholson*, and the Estate of the said *George Smith* respectively, would be entitled to the same in the proportions aforesaid; that is to say, five twelfths, two twelfths, and five twelfths respectively. The Defendant, and the said *Thomas Fenton Scott*, further insisted, that upon a calculation made on the principle before stated, the Estate of the said *W. F. Scott* would be found to be entitled to receive, in the first place, out of such Monies, the sum of 46,847*l.* 7*s.* 8*d.* The Defendant further submitted, that as the Heir at Law of the Testator *William F. Scott*, he was entitled to claim, as against the said *T. F. Scott*, the whole of the said sum of 46,847*l.* 7*s.* 8*d.* or so much thereof as the Surplus in the hands of the Plaintiffs, and any further Monies to be collected or

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received by them as Assignees, might be sufficient to answer, and all further Monies which, on the principle before stated, might be found coming to the Estate of the Intestate *W. F. Scott*. The Defendant then stated his belief, that if the Plaintiffs had waited to collect the outstanding joint Property of the Bankrupts, it would have been unnecessary to sell the whole of the separate real Estate of the said *William F. Scott* for payment of his separate Debts, or the joint Debts of the Bankrupts; and that the Plaintiffs might with such joint Property alone, when collected, or with the same and the separate personal Estates of the said Bankrupts, and so much of their real Estates as it was necessary to sell, have paid the whole of the said joint Debts and the Interest thereon; and that in such case, so much of the real Estate of the said *W. F. Scott*, as was not sold, would have remained vested in the Plaintiffs as Assignees, in Trust for the Defendant, as the Heir at Law of the said *William F. Scott*. He further submitted, that the Monies now remaining in the hands of the Plaintiff ought to be considered as the produce of the real Estates of *William F. Scott*, which in that case would not have been sold; and that any further monies which should come to the hands of the Plaintiffs as Assignees, on account of the joint Estate of the Bankrupts, ought also to be considered in the same point of view as real Estate; and that the Defendant, as the Heir at Law of the said *W. F. Scott*, is accordingly now entitled to be in the same situation, with respect to the Monies so remaining in the hands of the Plaintiffs as Assignees, or to come to their hands, as he would have been in with respect to the said separate real Estate of the said *William F. Scott*, if only so much thereof had been sold as was necessary ultimately to pay the said joint Debts and Interest thereon, and is accordingly now entitled to receive from

the Plaintiffs, in the first place, the said Balance now remaining in their hands, and any further Monies which may yet come to their hands, on account of the joint Estate of the said Bankrupts, not exceeding the said sum of 46,847 *l.* 7*s.* 8*d.* which will, upon the calculation before mentioned, be found to be the Sum which, as between the Estate of the said *W. F. Scott*, and of the said *Lucas Nicholson* and *George Smith*, the Estate of the said *W. F. Scott* ought to receive in the first place out of the Monies so remaining in, or yet to come in, the hands of the Plaintiffs as Assignees.

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Mr. *Hart*, for the Plaintiffs, stated, that as Assignees they were desirous of distributing the Property as the Court should direct; and the point to be argued was between the *Heir at Law*, and the personal Representatives of *W. F. Scott*.

Mr. *Bell*, and Mr. *Rose*, for the Heir at law. The Case is new. *Bromley v. Goodere* (a) decides, that if the real Estate had not been actually sold, Mr. *Scott*'s Heir would have been entitled to it, and as it has turned out that the real Estate sold since *Scott*'s death, need not have been sold if the other Effects had been got in, his Heir at Law is entitled to be reimbursed the produce of these Estates sold since Mr. *Scott*'s death. In *Bromley v. Goodere* the decree was, that if necessary a sufficient part of the real Estate should be sold to pay the Interest; and the surplus of the Money arising from such Sale, if any, to be paid to the Heir. The same rule must prevail though the Estate has been sold. With respect to the Estates sold in the life-time of the Bankrupt, it would be difficult, perhaps, to contend that

(a) 1 Atk. 76.

(b) 1 Jac. c. 15. s. 15.

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the real Estate was not, for every purpose, to be considered as converted.

Mr. *Heald*, and Mr. *Barber*, for the next of Kin. The question is, whether the Acts of Parliament relating to Bankruptcy, do not so operate on the real Estates of Bankrupts so as to extinguish any claim of the Heir as such, to a Surplus? The Statute of *James (b)* directs, that in case of a Surplus, the same should be paid to the Bankrupt, his Executors, Administrators and Assigns, treating such Surplus as personal Estate. The real Estate sold in the life-time of the Bankrupt is converted and gone; the Heir can have no claim in respect of that; and the real Estate sold after *Scott's* death was necessarily sold to pay the Debts, there being then no other Effects in the Plaintiff's hands for that purpose, and therefore that Estate must be considered as converted, and go to the personal Representatives of *Scott* the Bankrupt. The real Estates of the Bankrupt have been duly sold under the Bankrupt Laws, and those Laws do not regard the personal Estate as the primary Fund to pay the Debts, but treat both as equally liable, and in this respect differs from the ordinary administration of Estates.

The VICE-CHANCELLOR:—

As to the real Estate sold or contracted to be sold, during the life of the Bankrupt *Scott*, it must at his death be considered as converted into Personalty; but as to the real Estate which was unsold and uncontracted for at the death of the Bankrupt, it is to be considered as descending to his Heir, subject to the charge created by the provisions of the Bankrupt Laws

(b) 1 Jac. 1, c. 15, s. 15.

for the payment of his Debts. It can make no difference in principle, whether such a charge be created by the provision of the Law, or the provision of the Party. As far as the real Estate is not exhausted by that charge it is the Property of the Heir.

The Bankrupt Laws had no purpose to alter the character of surplus Property between the real and personal Representative of a Bankrupt; and as to the charge for payment of Debts, created by Bankruptcy, upon the real Estate of a deceased Bankrupt, his personal Estate is to be considered as first applicable; and to the extent in which it shall ultimately appear, that the real Estate was not required for the payment of Debts, the Heir is entitled, in the first place, to be indemnified out of the Surplus.

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1. Testator bequeathed 400*l.* to trustees, to pay the interest to his daughter, a married woman, for her sole use during her life, and then to pay the same to her husband for his life, and after his death to pay the principal to their children on attaining twenty-one. It appeared by evidence, that the testator afterwards advanced 100*l.* to the husband of his daughter, and that he gave a receipt for the same, expressing it to be as part of the portion of his wife—and the testator enclosed the receipt, together with his will, in an envelope—and that since the wife's death, the husband had received only interest on 300*l.* for many years. Held, that the gift of the 100*l.* was not an ademption, *pro tanto*, of the legacy [*Bell and others v. Coleman*] - - - - - 22

2. Bequest of two policies on a life, upon certain trusts. The amount of the policies was received by the testator. Held, the legacies were adeemed. [*Barker and Ur. v. Rayner and others*] - - 208

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## BANKRUPTCY.

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1. V. and Co. creditors of U. and Co. being displeased with the conduct of Wilbran, one of the partners in the firm of U. and Co. they arrested U. and Co. All the partners, except Wilbran, put in bail, but he continued in prison two months, and a commission was issued against him by U. and Co. Wilbran petitioned to supersede the commission, on the ground that it was taken out for the purpose of dissolving the partnership as to him. Held, that a commission is, in a sense, a legal right, and is not affected by any bye-object in the party suing it out, unless there be fraud; and petition dismissed. [*Ex parte Wilbran in re Wilbran*] 1

2. On a separate commission, against one of a firm, a joint and separate

creditor, who in respect of his joint debt, had taken a warrant of attorney, and sued out a separate execution against the bankrupt, held entitled to prove his separate debt, without giving up his execution. [*Ex parte Stanborough*] 89

3. Petitioning creditor allowed his costs of resisting an application to supersede the commission, out of the bankrupt's estate. [*Ex parte Bottomley in re Crowther*] 91

4. C. and Co. being embarrassed, the Bank of England agreed to advance them 40,000*l.* upon acceptances of the friends of C. and Co. The acceptances were given, and the acceptors, or any substituted acceptors, were secured by C. and Co. assigning to trustees, for that purpose, certain property in America. Two of these acceptances were thus:—C. and Co. drew a bill on J. and W. J. for 2,500*l.* which they accepted, and it was indorsed by C. and Co. to the Bank. R. accepted another bill to that amount, drawn by J. and W. J. which was also given to the Bank. The bills, when they became due, were renewed. Before the renewed acceptance of J. and W. J. became due they stopped payment; and R. the drawer, being called upon, he obtained an acceptance from C. T. T. and indorsed it to the Bank, and the acceptance of J. and W. J. was thereupon delivered to him. J. and W. J. becoming bankrupts, R. proved the amount of their acceptances in his possession, and received eighteen

shillings in the pound. On petition, the proof of R. was ordered to be expunged, the dividends repaid, and the bill delivered up. [*Ex parte Hunter* and another in *re Goodchild*] - - - - - 165

5. A creditor who has a right to elect between joint and separate estate, must make his election before a dividend is declared of the estate against which he has proved. His election is gone if he does any act in the character in which he has proved. [*Ex parte Husband in re Blackburne*] - - - - - 418

6. Scott, Nicholson and Smith carried on business as bankers in partnership, and were interested in the profits and losses of such banking concerns respectively, as follows:— Scott for five twelfths, Nicholson for two twelfths, and Smith for five twelfth parts. On the 20th January 1812, a commission of bankruptcy was awarded against them, but the full amount of the joint and separate debts of said bankrupts, with interest, was paid. To complete such payment, real estates of great value, belonging to the bankrupt, Scott, were sold by the assignees; and on the whole, the said bankrupt contributed upwards of 46,000*l.* beyond his proportionate share of the losses of the firm. Part of said estates were sold during the life of the bankrupt, Scott; part were contracted to be sold, but not sold at the time of his death, and the remainder were sold since his death; and a surplus remained in the hands of the as-

signees. Held, that the heir of Scott, as such, had no claim in respect of the estates of the bankrupt, Scott, sold in his life-time, the same being converted out and out, and the produce must be taken as it is found; but that the surplus monies, in the hands of the plaintiff, to the amount of the produce of the estate sold after the death of Scott, the bankrupt, belonged to the heir at law, with four per cent. interest, unless rents and profits were claimed. [*Banks and others v. Scott and others*] - 493

## BREACH OF TRUST.

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The Skinners Company held to be trustees of certain lands, in their corporate character, as governors of the possessions, revenues and goods of the free grammar-school of Sir A. Judd, Knight, in the town of Tonbridge, Kent; and that the same are held by them, according to the tenor of letters patent of Edward the Sixth, "for the support of the master and under-master of the said school, and for the reparation of the said lands and tenements, and not otherwise, nor to any other uses and intents." [*The Attorney-General v. Skinners Company and another*] - - - 173

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Court will not decree a rate to be made to reimburse a former churchwarden monies laid out,

whilst in office, in pursuance of a vestry order. [*Lanchester v. Thompson and others*] - - - 4

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1. Items in a solicitor's bill were charged to the plaintiff in respect of the defence of a third person, at the plaintiff's request. The solicitor did not show that he was employed in such defence by the plaintiff, and the items were struck out; and held, that such items were to be computed among the deductions, for the purpose of determining upon whom the costs of the taxation were to fall. [*Rigby v. Edwards*] - - - - 20
2. On a decree, liberty was given to the plaintiff to bring an action in the Court of King's Bench, and an action was brought. The defendant applied to a Judge of the

Court of King's Bench for the usual order, for security for costs, the plaintiff being resident at Paris, and so stated in his bill. The Judge referred the application to the Court of Chancery, and the Court ordered such security to be given. [*Desprez v. Mitchell*] 87

3. Assignees who are brought before the Court by a supplemental bill, may be made liable to the costs of the whole suit. [*Whitcomb v. Minchin*] - - - - - 91
4. An order was obtained, directing security to be given for costs, but the order did not direct the stay of all proceedings until such security should be given; and, therefore, though no security was given, a motion of course for a commission to examine some old witnesses was held to be regular; but, in future, the Court intimated that the order in such cases should direct all proceedings to be stayed, until security was given. [*For v. Blew*] 147
5. On demurrer, held, that if the plaintiff dies before the costs of a bill dismissed are taxed, a bill of revivor by his representatives for costs cannot be sustained. [*Jupp v. Geering*] - - - - 375
6. A bill by one of two residuary legatees, the other being a defendant. The usual decree was made; and held, on further directions, that costs could not be given out of the fund in court, as between solicitor and client, without the consent of the defendant. [*Fenner v. Taylor*] - - - 471

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1. Demurrer lies to a bill of discovery merely, unless in aid of a proceeding, either pending or intended, alleged in the bill. [*Cardale v. Watkins*] - - - - - 18
2. Demurrer by an officer of the Bank allowed, upon the ground that as to the discovery sought from him he was merely a witness. [*How v. Best and Hase*] - - - 19
3. Bill filed against bankrupts and their assignees, questioning the validity of the commission, and praying an account; or if the commission was legal, for leave to prove what should appear to be due under the bankruptcy. On a general demurrer by the bankrupt for want of equity, the same was allowed; the proper mode of questioning the validity of a commission being by petition. [*Bailey v. Vincent and others*] - - - 48
4. Bill by creditor against executor and trustee and mortgagors in possession, for an account, and also against one of several purchasers in distinct lots of an estate, from the executor and trustee, impeaching such purchase, held not to be demurrable to by such purchaser, for

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5. On a bill for a discovery, and a commission abroad in aid of a defence to an action for a libel, a demurrer was overruled, with liberty to amend the same, the plaintiff being entitled to a commission abroad, though not to a discovery from the defendant. [*Thorpe v. Macauley*] - - - - - 218
6. Mortgage of a copyhold. The mortgagor became a bankrupt; but no bargain and sale was made to his assignee. The mortgagee files a bill against the bankrupt, and his assignee, to redeem. The bankrupt demurs, and demurrer allowed, he not being a necessary party to the bill. [*Lloyd and others v. Lander and others*] 282
7. It is good ground of demurrer, that the name of counsel does not appear to the bill. [*Kirkley v. Burton*] - - - - - 378

## DEVISES AND BEQUESTS.

See ADEPTION.—ELECTION.—  
RESULTING TRUST.

1. The nomination by a will of the testator's wife as executrix, "thereby bequeathing to her all the property of whatever description or sort that I may die possessed of, &c." held to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will. [*Noel v. Hoy*] - - - - - 38
2. Testator, by his will, gave to trustees certain real estates, in trust,

- to M. for his life, with remainders over; and his personal estate, in trust, to B. for life, and to her children after her death; and directed, "that the timber or wood which should be upon his real estates, should, from time to time, be used for the repairing the houses thereupon, or otherwise for the benefit and advantage of his estate; or that the same should be sold, and the money arising from the sale thereof should be applied in the same way as his personal estate was directed to be applied." Held, that the devise to M. carried the underwood; and that the trustees, leaving sufficient timber on the estate for repairs, might cut down such timber as was fit to be felled, or in a decaying condition, but not the underwood. [*Butler and another v. Barton and others*] - - - - 40
3. A direction in a will, "to keep accounts," held to afford a presumption that the executrix was not meant to take beneficially; but parol evidence was admitted on behalf of the executrix, to show, that she was intended to take the residue for her own benefit; and such evidence being satisfactory, the bill, by the next of kin, was dismissed. [*Gladding v. Yapp*] - - - - - 56
4. Bequest to E. and M. "of all and singular his plate, linen, china, household goods, and furniture and effects, that he should die possessed of;" and a devise in trust of a real estate, and out of the monies to arise from the sale thereof to pay funeral expenses, money due on mortgage, and all other debts, and the residue amongst the testator's children. Held, that the word "effects," coupled with the context, operated as a specific bequest of the personal estate, and that the same was not liable to the payment of debts. [*Michell v. Michell and others*] - - 69
5. Devise to trustees and their heirs, of a messuage and premises in trust, to permit L. S. G. to enjoy the same during his life; and after his decease, his first and other sons and daughters now living successively for life, as they were in priority of birth, but the sons to be preferred in succession to the daughters, and the heirs of the body or bodies of such sons and daughters respectively issuing; and for default of such issue, in trust for testator's own right heirs for ever. L. S. G. enjoyed the premises for his life; his son entered and suffered a recovery: held, he was tenant in tail under the will; and the trustees were directed to convey to him in fee, and deliver up the title deeds. [*Green v. Staples and others*] 85
6. Testatrix by her will limited certain estates to her daughter Lady O. for life, remainder to her first and other sons successively in tail male; remainder to her daughters as tenants in common in tail general; and if an only surviving

- daughter, to her in tail general; and in default of all such issue of Lady O. to trustees for 1,000 years, upon trust to raise certain legacies as she should bequeath by any codicil or codicils; and she afterwards by codicil bequeathed certain legacies, after the decease and failure of issue of her daughter Lady O. Lady O. died without issue. Held, that the legacies were payable when the term was to take effect. [*Morse and others v. Marquis of Ormonde and others*] - - - - - 99
7. A testator possessed of 5,000*l.* 3 per cent. consols, bequeathed 2,000*l.* thereof to his trustees, in trust as to 1,000*l.* for G. and as to 2,000*l.* for W. C. Held, that the testator meant to give his trustees 3,000*l.* 3 per cent. consols; the bequest to them of the 2,000*l.* 3 per cent. being only mentioned once, and the legacy of 2,000*l.* to W. C. being mentioned twice. [*Alford and Ux. v. Green and others*] - - - - - 92
8. Bequest of residue to testator's wife, "requesting she would at her death leave 200*l.* to each of the Miss Nortons, and leave the remainder of her property to my nephews G. and W. Eade." It was referred to the Master to inquire who were the persons meant by the Miss Nortons; and on his report, and on further directions, the legacies were secured to the three persons proved to have been intended by the testator; but the testator's wife was held absolutely entitled to the remainder of the property, in exclusion of the claims of G. and W. Eade. [*Eade v. Eade and others*] - - - - - 118
9. Bequest of household goods, &c. after payment of debts, &c. to testator's wife for her life, or widowhood, with power to her to sell the same, as she should think proper, for her own benefit, and the maintenance of testator's nephew and daughter-in-law, during their minority, with a bequest over, upon the death or second marriage of the wife, of the same, or so much as should then remain to such nephew and daughter-in-law. Held, that the widow was entitled to the residue for her life, or widowhood, with a power to apply any part of the capital for her own benefit, and the proper maintenance of the nephew and daughter-in-law during their minorities; and that on the death or marriage of the widow, the remainder of the capital unapplied was well limited over. [*Surman v. Surman*] - - - - - 123
10. Devise in favour of children of testator's sister, held, on the construction of the whole of the will, to apply to such children only as were living at the testator's death, and not to include after-born children. [*Scott v. Harwood*] - 332
11. Lord Vere bequeathed certain chattels to trustees in trust for his wife for life, then to his son for life,

- "and after the decease of the survivor, in trust for such person as should from time to time be Lord Vere; it being my will and intention that the same should, after the decease of my wife, go and be held with the title of the family, as far as the rules of law and equity will permit." The testator at his death left his wife and son surviving, and also two children of his son. The wife and son died. The eldest grandson afterwards died, leaving issue a son, who died under twenty-one, the second grandson being still living. Held, that it was a direct gift of the chattels, and not an executory trust, and that the son and eldest grandson took only for life, and that the great grandson, deceased, took the absolute interest. [*Lord Deerehurst and others v. Duke of St. Albans and others*] - - - - 233
12. Limitation of personal estate to go as heir-looms. [*Gower v. Grosvenor*] - - - - - 337
13. The construction of a residuary clause does not depend upon the particular property which the testator might have in his contemplation; but upon what the words which he has used will embrace according to their ordinary import. [*Bland v. Lamb*] - - 412
14. The testator gave all his property to his wife, trusting that she would use it for the spiritual and temporal good of herself and children, remembering always the church and the poor. Held, that the wife took absolutely. [*Curtis and others v. Rippon and others*] - - 434
15. Bequest to trustees in trust to pay C. H. an annuity during his life, provided that if C. H. should by any ways or means whatsoever, sell, dispose of, or encumber the right, &c. he might have for life, then his interest to cease, and the trustees to apply the same for the benefit of his children. Held, that on the bankruptcy of C. H. his interest ceased, and his children became entitled. [*Cooper v. Wyatt and others*] - - - - - 482

## DISCOVERY, BILL OF

See DEMURRER, 1. 2. 5.

## DISMISSION OF BILL.

See PRACTICE, 8. 10.

## DISTRESS

See RECEIVER, 2.

## DOMICIL.

An acquired domicile is not lost by mere abandonment, but continues until a subsequent domicile is acquired, which can only be, *animo et facto*, unless the party die *in itinere* toward and intended domicile. [*Munroe v. Douglas*] - 379

## DOWER.

See ELECTION.

1. Conveyance to G. R. his heirs and assigns, to such uses as J. R. should appoint; and in default of appointment to J. R. in fee. J. R. who was married, by lease and release and appointment, conveyed

to a purchaser. *Quære*, whether the wife of J. R. if she survived him, would be entitled to dower.

[*Ray v. Pung*] - - - 310

2. A husband, before Lord Eldon's act, borrowed an estate for the purpose of suffering a recovery, in order to acquire the ownership of money to be laid out in land. *Semble*, his wife is dowable of the estate borrowed. [*Henley v. Webb*] 407

### EFFECTS.

See DEVISES AND BEQUESTS 4.

### ELECTION.

See BANKRUPTCY, 5.

The testator directs his trustees to continue his farming business on his farm of one hundred and thirty-six acres, during the minority of his daughter, and for her benefit. The widow, a devisee, is put to her election in respect of her dower out of this farm, because the testator's intention was, that the trustees should be possessed of the *entire* farm, and her title to dower would disappoint that intention. [*Butcher and Wife v. Kemp* and others] - - - 61

### ELECTION TO PROCEED AT LAW OR IN EQUITY.

See PRACTICE, 2.

### EVIDENCE.

See WITNESSES.

### EXECUTORS.

See DEVISES AND BEQUESTS.—RECEIVER.—SET-OFF.

1. An executor purchasing assets  
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belonging to the estate of his testator, with the assent of the parties then interested, will not, after a length of time, be answerable for the profit he has made; but he will, when he has purchased with a fraudulent intention. [*Wharton v. Toone* and others] - - - 54

2. Executor and trustee cannot claim compensation for personal trouble and loss of time in the performance of trusts under a will, but should have made a special case for compensation before he entered on the performance of the trusts. [*Brocksopp v. Barnes*] 90

### FEME COVERT.

See LEGACY.—VENDOR AND VENDEE, 2.

A wife who pledges her separate property for the debt of her husband, is entitled to have his property comprised in the same security first applied, as between the wife and husband, and his general assignee. Where a wife has an adequate settlement to her separate use she is not entitled to a further provision out of a life-interest to her, which the husband takes *jure mariti*, except in case of his desertion or insolvency. A feme covert may file her bill to avoid an annuity charged upon her separate property, without offering to repay the consideration; nor is there any lien for the consideration upon her separate property. [*Aguilar v. Aguilar*] - - - 414

### FORFEITURE.

See DEVISES AND BEQUESTS, 15.



## FRAUD.

See EXECUTORS.

## GUARDIANS.

See INFANT.

## HEIR-LOOMS.

See DEVISES AND BEQUESTS, 12.

## IMPERTINENCE.

See WITNESS, 3.

In answer to the usual interrogatories in a bill against an executor, as to the particulars of personal estate, and for what it sold, a schedule annexed to the answer, in which every particular article of personal estate was set forth, and what it sold for, was, on exceptions, held impertinent; it being only necessary to state the whole amount for which it sold. [*Beaumont and others v. Beaumont and others*] 51

## INFANT.

See FEME COVERT, 1.—WITNESS, 2.

1. When a suit is instituted for the administration of an infant's estate, the Court has jurisdiction over the infant; and on the petition of the guardians may order him to be delivered to them. [*Wright and another v. Naylor and another*] 77
2. The infant heir of a messenger, to whom, in bankruptcy, a provisional assignment had been made, and who died before the choice of assignees, held to be within the statute of *Anne*. [*Ex parte Carter, in re Portsmouth Bank*] - - 81

## INFANT TENANT IN TAIL.

See INSOLVENT ACT.—TIMBER.

1. Infant put to an election under a will, and a reference to the Master to ascertain what election would be most to his benefit. [*Ebrington v. Ebrington*] - - - - 117
2. Tenant in tail, with remainders over, by bargain and sale conveyed to B. for the purpose of making him tenant to the *præcipe* in a recovery. By mistake, the recovery was suffered before the bargain and sale was executed. The tenant in tail died. Held, that the infant heir of B. was not a trustee under the stat. 7 *Anne*, c. 19. [*Ex parte Boehm and another, in re Bennett*] - - - - 124
3. Wife, an infant, being entitled to a present interest in certain personal property, and also to certain other contingent interests, a deed of separation was entered into between herself, her father, and her husband, by which she was to retain her present interest in the property; and it was agreed that the husband should have a certain share in the contingent property, if it should fall into possession. The husband died before the wife. Held, that the deed was a nullity as to the wife; and that the contingent interest falling into possession, she was entitled by survivorship. [*Stamper v. Barker and others*] - - - - 157
4. Premises were by deed, dated the 3d January 1765, conveyed in trust for W. C. for life, remainder to A. P. B. in fee, subject to an annuity or rent-charge of 400*l.* to E. C. for life, if she should survive

W. C., and subject to a term of ninety-nine years, granted to J. B. and R. C. in trust for securing the rent-charge, with a proviso, making void the term on payment of the annuity, and subject also to a proviso, that if W. C. should survive E. C. and marry again, he might appoint an annuity of 100 *l.* out of the premises, to the use of the person he should marry. E. C. died, as did W. C., without executing the power. Held, on petition, under the 7 *Anne*, c. 19, that the legal estate descended on the infant heir of the surviving trustee, who as a trustee within the act was directed to convey. [*Ex parte Ward*, widow, *in re Ward*, infant] - - - - - 291

## INJUNCTION.

See PRACTICE, 7. 16.—TIMBER, 2.

Injunction granted, under the circumstances, to restrain proceedings in the Court of Session in Scotland. [*Bushby v. Munday* and others] - - - - - 297

## INSOLVENT ACT.

Infant tenant in tail, taking the benefit of the insolvent act, (49 Geo. 3, c. 115), his estate tail does not pass to his assignees, because he could not be legally in custody for debt. [*Burton v. Haworth*] - - - - - 50

## INTERPLEADER.

On a bill of interpleader, held, that an agent to receive particular monies, is bound to pay the same over to his principal, notwithstanding the claims of third per-

sons. [*Nickolson v. Knowles* and others] - - - - - 47

## INTERROGATORIES.

See PRACTICE, 19.

## ISSUE.

An issue will not be directed to be tried in the Court of Exchequer, unless for some special reason, and on a motion made for that purpose. [*Antrobus v. East India Company*] - - - - - 3

## LEGACY.

See ADEPTION.—DEVISES AND REQUESTS, 6, 7.

Legacy to a married woman, “to and for her own use and benefit,” does not give a separate estate. [*Roberts v. Spicer* and others] 491

## LIBEL.

See DEMURRER, 5.

## MONEY, PAYMENT OF, INTO COURT.

See PRACTICE, 9.

## MORTGAGE.

See FEME COVERT.

1. Mortgagor of a copyhold devises the same to his wife, together with his personal estate, and appoints her executrix. She dies without paying off the mortgage. Held, that her heir is not entitled to have the mortgage paid out of the personal estate of the mortgagor. [*Scott v. Beecher*] - - - - - 96
2. A delivery up of mortgage deeds does not cancel the debt; but the delivery up of such deeds, and of a bond given at the time of the mortgage, for the purpose of releasing or acquitting the debt, in

case the donor should not recover from the illness with which she was then afflicted, is, it seems, an effectual donation *mortis causâ*. [*Hurst and another v. Beach and others*] - - - - - 351

3. N. mortgaged to C. to secure 1,000 l.; C. assigned the mortgage to M. to secure 700 l.; but no notice of the assignment was given to N. Held, on a bill by N. against M. to have mortgage deeds delivered up.

1st. That C. was not a necessary party, as he had been examined as a witness, and admitted that N. had paid him his mortgage money.

2d. That delivery of goods to C. by N. was a good discharge of the mortgage debt, and was a good payment against M.; but,

3d. An account was directed what part of mortgage money was paid, as C's evidence, from his conduct, could not be admitted as a sufficient proof. [*Thomas Norrish v. Mary Marshall*, widow, since deceased, and *Thomas Marshall*]

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#### MORTMAIN.

M. N. having several charges on lands, by his will directed his trustees and executors to convert all his property into ready money, and after payment of his debts, legacies, &c. to pay the residue to his wife, A. N. A. N. by her will, disposed of the residue of her personal estate, after certain payments to charities. After her death, the charges on the lands were paid off.

Held, that the monies charged on lands, did not pass to the charities, but that such bequest was void under the mortmain act. [*Attorney-General v. Harley*] - - - 321

#### MULTIFARIOUSNESS.

See DEMURRER, 4.—PRACTICE, 13.

#### NE EXEAT.

A *ne exeat* does not lie in respect of costs taxed in a Chancery suit. [*Goodman v. Sayers*] - - 471

#### PAROL EVIDENCE.

See DEVISES AND BEQUESTS, 3.

Parol evidence is admissible to show that the instrument is not the will of the testator as to a particular estate; but is not admissible for the purpose of setting up the disappointed intention of the testator. [*Earl of Newburgh v. Countess Dowager of Newburgh*] - - 364

#### PARTICULARS OF SALE.

See VENDOR AND VENDEE, 1.

#### PARTIES.

See DEMURRER, 6.—MORTGAGE, 3.

#### PARTITION.

On a bill for a partition, and an account of rents received, a decree for that purpose will be made, and the relief will not be confined merely to a partition. [*Lorimer v. Lorimer*] - - - - 363

#### PLEA.

1. Plea overruled, there being relief prayed, which the plea did not cover. [*Barker v. Ray*] - - 64

2. Wherever a plea is supported by an answer, the Court, on the overruling of the plea, will not give leave to amend. [*Thompson v. Wild*] - - - - - 82
3. When averments in a plea are necessary. [*Cork v. Wilcock*] 328
4. Bill for discovery, and to restrain defendant from setting up outstanding terms. Plea of title to the whole bill overruled. [*Gait v. Osbaldeston*] - - - - - 427

## POLICY OF INSURANCE.

See ADEPTION, 2.

## POWER.

See APPOINTMENT.

## PRACTICE.

See COSTS.

1. On a motion to dismiss for want of prosecution, the six-clerk, in his certificate as to proceedings in the cause, (which may be obtained after the motion is made), must not state any proceedings subsequent to the motion. [*King v. Noel*] - - - - - 13
2. After an order to elect, whether the plaintiff will proceed in equity or at law, the plaintiff cannot, on a motion of course, move for leave to file exceptions, *nunc pro tunc*, but ought to make a special application for that purpose, and for an order to suspend the election, until the exceptions are answered. [*Coupland and others v. Bradock*]

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3. There being two suits to take executors accounts, the prosecution of the first suit was, under the circumstances, stayed, and the prosecution of the decree in the second suit was given to the plaintiff in the first suit. [*Hawkes v. Barrett and another*] - - 17
4. After a commission sent abroad for the examination of witnesses, a witness, before the commission had reached its destination, returned to England, and a motion was made to examine him, *de bene esse*, but refused; and held, that the bill must be amended. [*Atkins v. Palmer*] - - - - 19
5. A creditor coming in under a decree, permitted to prosecute the same on account of delay, though only interested in the first part of the decree, and not in the whole of it, as the plaintiff was. [*Edmunds v. Acland*] - - - - - 31
6. Where, after issue joined, an amendment of the bill became necessary, an order was made, on a motion by the defendant, that the plaintiff should amend within a fortnight, or that his bill should be dismissed. [*Pratt v. Holebrook*] - - - - - 30
7. Order for an injunction obtained on a day to which the seal was adjourned, the plaintiff not being in a condition to move at the beginning of the seal, set aside, with costs. [*Rowe v. Jarrold and others*] - - - - - 45
8. Notice was given of a motion to dismiss. On the same day, the

- motion to dismiss was made, a replication was filed. Held, that the bill did not stand dismissed, and that the defendant was not entitled to the costs of the motion. [*Reynolds v. Nelson*] - - - - 60
9. Order made, that A. B. a stranger to the suit, might be at liberty to pay money into Court. [*Francis v. Collier*] - - - - 75
10. Plaintiff becoming bankrupt, a special motion must be made, and notice served on the assignees, that they may file a supplemental bill, in the nature of a bill of revivor, within a given time, or that the bill may stand dismissed. [*Porter v. Cox*] - - - - 80
11. A cause cannot be set down, unless by consent, in the same term in which a rule to pass publication is given. [*Lord v. Genslin*] 83
12. The decree being, amongst other things, that "the parties should produce before the Master all books, papers, &c. the words, "as the Master shall direct," were added on a motion for that purpose. [*Punderson v. Dixon*] 121
13. Multifariousness in a bill cannot be objected to on the hearing of the cause. [*Ward v. Cooke*] 122
14. The defendant set down the cause, and the solicitor for the plaintiff undertook to appear, without having a subpoena to hear judgment. When the cause came on, the plaintiff did not appear. Held, the bill could not be dismissed, for want of an affidavit that a subpoena to hear judgment had been served on the plaintiff, and that the cause could only be struck out of the paper; but that on an application for that purpose, the solicitor for the plaintiff would be made to pay the costs occasioned by his default of appearance. [*Ellis v. King*] - - - - 21
15. If one of two defendants sets down a cause, he is only to serve the plaintiff with a subpoena to hear judgment. [*Clarke v. Dunn and Phelps*] - - - - 414
16. Injunction to restrain mortgagor from cutting timber, not granted, unless the security be insufficient or scanty without the timber. [*Hippesley v. Spencer*] - - 421
17. Leave given to a creditor to prosecute a suit. [*Fleming v. Prior*] - - - - 421
18. Where a supplemental bill is not a supplemental suit, but only introduces supplemental matter, the whole record is one cause, and a general replication applies to the whole record, and not merely to the original bill. [*Catton v. Earl of Carlisle*] - - - - 427
19. The Master may, at his discretion, receive further interrogatories. [*Price v. Lytton*] - - - - 465
20. Although defendant not bound to appear at a particular time, yet if he do appear, he is in contempt after eight days from appearance. [*Hanwarst v. Welleter*] - - 422
- ## PRODUCTION OF DEEDS, &c.
- See PRACTICE, 12.
- Production of a deed not connected with plaintiff's title, and which

gives title to the defendant, refused.  
[*Sampson v. Swettenham*] - - 16

### PROFIT.

See EXECUTORS.

### PUBLICATION.

See PRACTICE, 10.

### RATE.

See CHURCHWARDEN.

### RECEIVER.

1. Executor and trustee becoming a bankrupt, a receiver appointed, though the testator knew, after he had made his will, that a commission had been issued. [*Langley v. Hawk*] - - - - - 46
2. Receiver may distrain without applying to the Court. [*Brandon v. Brandon*] - - - - - 473

### RECOMMENDATORY WORDS.

See DEVISES AND BEQUESTS, 8.

### RECOVERY.

See APPOINTMENT.

### RE-EXAMINATION OF WITNESS.

See WITNESS, 6.

### RE-EXAMINATION OF WITNESSES.

See WITNESS.

### RESULTING TRUST.

Devise of an estate to trustees, to sell the same, without fixing any time for that purpose, and to apply the interest on the monies to arise by

the sale to the use of the plaintiff for life, and then over. The estates continued unsold, and the plaintiff, as the heir at law, claimed the rents and profits of the estate for the first year after the death of the testatrix, as being undisposed of; and held, that he was entitled to the same, [*Fitzgerald v. Jervoise and others*] - - - - - 25

### RETAINER.

See SET-OFF.

### REVIVOR, BILL OF.

See COSTS, 2.—PRACTICE, 10.

### SCOTLAND.

See INJUNCTION.

### SECURITY FOR COSTS.

See COSTS, 2.

### SEQUESTRATOR.

The Court will restrain a proceeding at law against a sequestrator, but has no authority to compel a party to be examined *pro interesse suo*. [*Kaye v. Cunningham*] = - 406

### SESSION, COURT OF.

See INJUNCTION.

### SET-OFF.

Legacy of 1,000*l.* to wife of J. A. who was largely indebted to the testatrix. J. A. becomes bankrupt, and his wife afterwards dies without having asserted any claim in respect of this legacy. The assignees of J. A. claim the legacy.

Held, that the executors of the testatrix are entitled to retain the legacy in part discharge of the debt due to the testatrix. [*Ranking and another v. Barnard and others*] - - - - - 32

### SETTLEMENT.

Where a settlement makes the right of a child to a provision clearly depend upon its surviving both parents, the intention must prevail; but where the expressions are ambiguous, the presumption is in favour of the child. [*Perfect v. Lord Curzon*] - - - - - 442

### SPECIFIC PERFORMANCE.

See COVENANT.

### SUBPOENA TO HEAR JUDGMENT.

See PRACTICE, 15.

### SUPERSEDEAS.

See BANKRUPTCY, 1.

### SURVIVORSHIP.

See INFANT, 5.

### TENANCY BY THE CURTESY.

The husband is tenant by the curtesy of the equitable inheritance of his wife, notwithstanding a direction to pay the rents and profits to her separate use during the coverture. [*Morgun v. Morgan*] 408

### TENANT IN TAIL.

See INSOLVENT ACT.—TIMBER, 1.

### TENANT FOR LIFE.

It is not of course to let the equitable tenant for life into possession. It must depend upon the intention of the testator. [*Tidd v. Lister and others*] - - - - - 429

### TIMBER.

See PRACTICE, 16.

1. In the case of an infant tenant in tail in possession, the Court will authorize the cutting of all timber which is fit to be felled; but where there is tenant for life impeachable of waste, with remainder over, the Court will only authorize the cutting of timber where the interest of the succession requires it. [*Hussey v. Hussey*] - - - 44
2. An injunction had been granted to prevent the cutting of timber, or other trees standing or growing for the shelter or ornament of Blenheim-house; but, on petition, a reference was made to inquire and state whether any of such timber and other trees might be cut with advantage to the present ornamental character of the gardens, &c.; or because they were too thickly planted to admit the most ornamental growth, or for any other reason. [*Attorney General v. Duke of Marlborough*] - 280

### TITLE.

See VENDOR AND VENDEE, 3.

### TRUSTEE.

Where the discretion of a trustee is to be exercised upon matter of

fact, the Court will substitute the *Master*: but not where the discretion is to be exercised upon matter of opinion and judgment. [*Walker v. Walker and others*] 423

#### VENDOR AND VENDEE.

1. Estates were put up to sale, and in the particulars of sale it was stated, they were to be sold "without reserve." The vendors employed a puffer, who actually bid at the sale. Held, that a bill for a specific performance would not lie against the purchaser at such sale. [*Meadows v. Tanner*] - 34
2. Legacy to a married woman of the dividends of 9,000*l.* three per cents. during her life, with a bequest over. The husband and wife join in a sale of this life interest, and the husband becomes a bankrupt. On a bill filed by the wife against the purchaser, insisting on a provision, held, though the Court could have compelled a provision by the husband on his bankruptcy, a purchaser is not compellable to make such provision. [*Elliott v. Cordell and others*] - - - - - 149
3. The Court will not compel a purchaser to take a title depending upon matter of fact, if the fact do not admit of satisfactory proof, or be not well proved. [*Smith v. Death*] - - - - - 371
4. An authority given by a testator to his trustee, to lay out money on security, includes in it an authority to give sufficient discharges to the borrowers [*Wood v. Harman*] 368

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5. A trustee of real estate for sale, who has renounced his trust, and released and conveyed to his co-trustee, is not a necessary party in a conveyance to a purchaser, nor is it necessary he should join in a receipt for the purchase-money.

[*Adams v. Taunton*] - - - 435

6. If the act of sale by trustees takes place under circumstances which amount to a breach of trust, this Court will not specifically perform the contract. [*Ord v. Noel*] 438

#### VESTRY ORDER.

See CHURCHWARDEN.

#### WASTE.

Equitable waste is a breach of trust, and the assets of a testator are answerable for such breach of trust. [*Marquis of Ormonde v. Kynersley*] - - - - - 369

#### WITNESS.

See COSTS, 4.—PRACTICE, 4.

1. After the examination of a witness on the part of the plaintiff, a written paper, signed by him and the defendant, was produced to him inconsistent with what he had sworn; a motion on the part of the plaintiff to re-examine the witness, and for a production of the written paper on his re-examination, refused. [*Bolt and another v. Birch*] - - - - - 66
2. After witnesses were examined upon the original bill, an amended bill was filed against new parties, some of whom were infants. The Court refused to order the evidence



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| <p>taken on the original bill to be read against the new defendants, the infants. [<i>Quantock v. Bullen</i> and others] - - - - - 81</p> <p>3. A witness in the cause cannot be re-examined before the <i>Master</i> to the same matter, as to which he was examined in the cause, without an order, which will only be made in cases of accident or surprise. [<i>Swinford v. Horne</i>] - - - 379</p> <p>4. It is a motion of course to examine, <i>de bene esse</i>, a witness above seventy years old, and it may be made before appearance; and it is no ex-</p> | <p>ception, that a reference of the bill for impertinence is pending. [<i>Prichard v. Gee</i>] - - - 364</p> <p>5. An executor cannot be examined as a witness to increase the assets. [<i>Hurst v. Beach</i>] - - - 335</p> <p>6. A witness omitted to state an additional fact he intended to state, and which, in a memorandum previous to his examination, he mentioned he could state. Held, he could not be re-examined, to give him an opportunity of stating such fact. <i>Asbee</i> and another v. <i>Shipley</i> and others] - - - - - 467</p> |
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END OF THE FIFTH VOLUME.

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